

THE PAST AND FUTURE EVOLUTION OF
EC PROCUREMENT LAW: FROM FRAMEWORK TO
COMMON CODE?

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I. INTRODUCTION

The European Community (EC) regulates public procurement in all of its twenty-five Member States in order to create a single market.¹ Procurement is governed both by general principles in the EC Treaty and by detailed secondary legislation in the form of directives, which set out award procedures for major contracts. The original EC procurement regime had very much of a framework character: it laid down a limited body of rules on key issues, and left considerable discretion to Member States to supplement these with their own national procurement laws. It is submitted, however, that the regime is currently undergoing a revolution: it is moving markedly away from its original framework character in the direction of a system of common rules. This article seeks to demonstrate the nature and extent of this trend.

The article first provides a brief introduction to EC procurement law (section II below). A more detailed introduction, which also offers a useful comparison with the U.S. federal system, has previously been provided by Verdeaux,² and the current article does not seek to replicate that work: it merely highlights the main features of the EC system that are relevant to the present analysis, and includes information on the major reforms of 2004, which occurred after Verdeaux's article.

The article will then move on to explain the key recent developments that have contributed to a more harmonized system. At the EC level, these developments are found both in the jurisprudence of the European Court of Justice (ECJ)—which has played a seminal role in the trend considered in this article—and in recent legislative reforms and proposals. The relevant developments will be examined by looking separately at three aspects of EC procurement law, all of which exhibit the same trend toward a more harmonized approach.

The first aspect, examined in section III, comprises the rules on award procedures for contracts governed by the directives. It will be explained that, as a result both of legislation and of judicial interpretation, these rules are steadily becoming more detailed and prescriptive.

The second aspect, considered in section IV, is the *coverage* of the EC rules, in particular of contracts *outside* the scope of the directives. Here it will be seen that, mainly as a result of judicial activity, EC regulation of contract award procedures has recently been extended into important new areas, including concessions (which are outside the directives), minor contracts below the directives' financial thresholds, and hard defense procurement.

* [AU: Please provide text for fn]

1. See, generally, SUE ARROWSMITH, *THE LAW OF PUBLIC AND UTILITIES PROCUREMENT* (2d ed. 2005), and the further literature cited in ¶ 3.1 (most of which does not yet cover the new 2004 directives discussed further below).

2. Jean-Jacques Verdeaux, *Public Procurement in the European Union and in the United States: A Comparative Study*, 32 *PUB. CONT. L.J.* 713 (2003).

The third aspect considered is supplier remedies for enforcing the rules, addressed in section V. Here also recent developments have reduced the area of discretion left to Member States.

In addition to these developments at the EC level, Member States sometimes choose to apply rules and principles of EC procurement law even to matters for which they are not required to do so. They are also increasingly involved in exchanging information on national approaches. These developments tend to increase the degree of harmonization among Member States, and are considered briefly in section VI.

Finally, section VII offers some brief conclusions on the nature and extent of the trend toward a more harmonized approach, and highlights some of the practical and constitutional concerns that it raises.

II. EC PUBLIC PROCUREMENT LAW: AN OVERVIEW OF POLICY, LEGISLATION, AND RECENT REFORMS

A. *Introduction to the EC Treaty and the EC Procurement Directives*

EC policy on public procurement is directed toward the EC's policy of creating a single market³ in the twenty-five Member States of the European Community.⁴ The presence of national bias in public procurement has been perceived by the EU as a significant obstacle to this single market, and as creating significant distortions in the patterns of trade between Member States (although there is disagreement over the extent of this problem).⁵

The EC Treaty does not prohibit discrimination in public procurement specifically. However, it contains general rules that prohibit Member States from discriminating against the industry of other Member States and that also forbid certain other barriers to market access; and these general rules apply to public procurement as well as to regulatory legislation.⁶ The main provisions are Article 28 EC, which, *inter alia*, prohibits discrimination against products imported from other Member States; Article 49 EC, which prohibits discrimination against EC firms wishing to provide services (including construction services) in another Member State; and Article 43 EC, which provides for freedom for EC firms to establish in other Member States (that is,

3. On this policy, see, generally, ARROWSMITH, *supra* note 1, ch. 3.

4. These are the six founding states of Belgium, France, Germany, Italy, Luxembourg, and the Netherlands; Denmark, Ireland, and the United Kingdom, who became members in 1973; Greece, a member from 1981; Spain and Portugal, who joined in 1986; Austria, Finland, and Sweden who acceded in 1995; and Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, the Slovak Republic, and Slovenia, who all acceded in 2004. The same rules on procurement as those of the EC effectively apply to Norway, Liechtenstein, and Iceland under the European Economic Area Agreement, 1994 O.J. (L 001) 1 (EC). See EEA Council Decision 1/95, 1995 O.J. (L 86) 58, on the accession of Liechtenstein.

5. See Poul Thøis Madsen, *Re-opening the Debate on the Lack of Impact of E.U.-Tenders on the Openness of Public Procurement*, 11 PUB. PROCUREMENT L. REV. 265 (2002), and the earlier literature cited there.

6. For details, see ARROWSMITH, *supra* note 1, ch. 4.

to set up a permanent operation there). These provisions have the effect, for example, of prohibiting governments from adopting price preferences that favor national products or services above those of other EC Member States.⁷

These Treaty provisions were, however, considered insufficient to open up public procurement, and to further promote this objective the EC has adopted secondary legislation in the form of directives.⁸ These directives lay down a series of rules on the award of major contracts. The objectives of the directives are, first, to ensure that opportunities are opened up to firms from other Member States, by requiring contracts to be advertised and awarded through a competition, and, secondly, to ensure a minimum level of transparency so that Member States cannot conceal easily discriminatory award decisions. In this respect, their approach parallels that of the World Trade Organization's Government Procurement Agreement (GPA), which also prohibits discrimination, and supplements this with a requirement for transparent award procedures to prevent hidden discrimination.⁹ On the other hand, it should be emphasized that the directives are *not* intended to lay down how Member States should achieve value for money or integrity in public procurement, which are matters for Member States to determine.¹⁰

The directives date back to 1971, and over the last twenty-five years they have been extended, consolidated and amended on many occasions.¹¹ The rules on contract award procedures are now contained mainly in two new directives, which were adopted in 2004.

For most contracts awarded by the public sector, the rules are found in Directive 2004/18/EC (Public Sector Directive).¹² Previously, there were

7. They also prohibit certain nondiscriminatory measures that restrict access to the market, see ARROWSMITH, *supra* note 1, ch. 4, and, as explained in section IV, impose positive obligations in conducting award procedures. The rules on free movement of goods also require Member States to give access to their markets to products in free circulation in the EC that originate in non-EC countries.

8. The nature of this form of EC legislation on procurement and its implementation is explained by Verdeaux, *supra* note 2, at 720–25.

9. On the GPA, see, generally, SUE ARROWSMITH, GOVERNMENT PROCUREMENT IN THE WTO (2003); ARIE REICH, INTERNATIONAL PUBLIC PROCUREMENT LAW: THE EVOLUTION OF INTERNATIONAL REGIMES ON PUBLIC PURCHASING (1999); LAW AND POLICY IN PUBLIC PURCHASING: THE WTO AGREEMENT ON GOVERNMENT PROCUREMENT (Bernard M. Hoekman & Petros C. Mavroidis eds., 1997).

10. See, in particular, the Opinion of Advocate General Jacobs in Case C-19/00, SIAC v. County Council of the Council of Mayo, 2001 E.C.R. I-7725, ¶ 33. Recent statements of the ECJ go further, indicating that it is also the objectives of the directives to ensure that the contract is awarded to the best bid, see Case C-247/02, Sintesi SpA v. Autorità per la Vigilanza sui Lavori Pubblici, 2004 E.C.R. I-9215, ¶ 40. However, this is not the same as saying that the directives seek to ensure the wise spending of public money, which, it is submitted, is not within the legal competence of the EC (although some recent statements by the European Commission suggest that the directives are concerned with this matter). For more information on the objectives of the directives see ARROWSMITH, *supra* note 1, ¶ 3.10.

11. For a history, see ARROWSMITH, *supra* note 1, ¶¶ 3.19–39.

12. Council Directive 2004/18, Coordination of Procedures for the Award of Public Works Contracts, Public Supply Contracts and Public Service Contracts, 2004 O.J. (L 134) 114 (EC) [hereinafter Public Sector Directive]. On the new directives in general, see Sue Arrowsmith, *An Assessment of the New Legislative Package on Public Procurement*, 41 COMMON MKT. L. REV.

three separate directives, one covering works contracts (the Works Directive 93/37), one covering supply contracts (the Supply Directive 93/36), and one covering services contracts (the Services Directive 92/50).¹³ However, the rules in these three directives were very similar and, for simplicity, have now been consolidated into a single instrument in the new Public Sector Directive. The rules in the Public Sector Directive apply to most major contracts awarded by government or public bodies, whether at federal, regional/provincial, or local/municipal level, with the scope of the public sector for this purpose being widely defined.¹⁴

The second main directive on contract award procedures is Directive 2004/17 (Utilities Directive). This directive replaces the previous directive governing utilities, Directive 93/38.¹⁵ The Utilities Directive governs procurement that is undertaken in connection with four specific areas of activity, namely, water, energy, transport, and postal services.¹⁶ The Utilities Directive applies to procurements in these four sectors by the traditional public sector bodies that are generally subject to the Public Sector Directive. Such bodies are, when operating in these four utility sectors, subject to the Utilities Directive rather than the Public Sector Directive. The Utilities Directive, in addition, applies to purchasing by public undertakings—public bodies that sell in the market—that are outside the Public Sector Directive because of their commercial nature (as explained further in section IV below), and to certain private companies that enjoy special or exclusive rights—such as monopoly operating rights—granted by Member States. The rationale for this extended entity coverage, which goes beyond that of most domestic systems, is that, in these utility sectors, the EC perceived that all these entities were potentially subject to governmental influence to favor national industry (for example, because of dependency on government for their operating licenses) and were not subject to the kind of commercial pressures that would enable them to resist such influence. As explained below, the award procedures of the Utilities Directive are more flexible than those of the Public Sector Directive.

1277(2004) [hereinafter *An Assessment of the New Legislative Package*]; ARROWSMITH, *supra* note 1, *passim*; THE NEW EU PUBLIC PROCUREMENT DIRECTIVES (Ruth Nielsen & Steen Treumer eds., 2005).

13. Council Directive 1992/50, 1992 O.J. (L 395) 33 (EEC) [hereinafter *Services Directive*] (as amended by Council Directive 97/52, 1997 O.J. (L 328) 1); Council Directive 93/36, 1993 O.J. (L 199) 1 (EC) [hereinafter *Supply Directive*] (as amended by Council Directive 97/52 (EC)); Council Directive 93/37, 1993 O.J. (L 199) 4 (EEC) [hereinafter *Works Directive*] (as amended by Council Directive 97/52 (EC)).

14. See ARROWSMITH, *supra* note 1, ch. 5.

15. Council Directive 2004/17, Coordinating the Procurement Procedures of Entities Operating in the Water, Energy, Transport and Postal Services Sectors, 2004 O.J. (L 134) 1 (EC) [hereinafter *Utilities Directive*]. See also sources cited *supra* note 12.

16. Postal services were added only in 2004. The old directive, Council Directive 93/38, 1993 O.J. (L 199) 84 (EC), also applied to the telecommunications sector, but this sector has not been included under the new directive since. Following the compulsory liberalization of telecommunications markets in the EC, entities in this sector now operate under competitive market conditions, which are sufficient to ensure commercial purchasing.

Remedies for enforcing the rules applicable to contracts within the directives are governed by two further directives, Directive 89/665 (Remedies Directive), dealing with remedies for contracts covered by the Public Sector Directive, and Directive 92/13 (Utilities Remedies Directive), on remedies for contracts covered by the Utilities Directive.¹⁷ These directives require states to provide for an effective and rapid system of supplier remedies, which must include provision for interim measures, setting aside of unlawful decisions, and damages, and must be available before an independent review body in the procuring state.¹⁸

The main explicit procedural requirements of the directives may be summed up briefly.¹⁹

First, the directives include a procedural requirement for contracts to be publicly advertised in the EC's *Official Journal* (where a summary is published in all the official languages of the EC). There is an exemption from this obligation only in exceptional and defined cases, such as certain circumstances of extreme urgency. Entities covered by the Public Sector Directive must place a separate notice for each procurement (referred to as a contract notice); entities covered by the Utilities Directive may either publicize their contracts using this approach, or use either a general notice of future contracts (referred to as a Periodic Indicative Notice, or PIN) or a notice advertising a list of registered suppliers (referred to as a qualification system).

The second procedural requirement is an obligation for covered entities to award contracts using certain competitive award procedures. A public sector contract may generally be awarded using either the open procedure, which is a formal tendering procedure in which any firm may bid,²⁰ or the restricted procedure, which is also a formal tendering procedure, but which allows for the procuring entity to select only a number of bidders (at least five). In both cases, the contract must be advertised in the *Official Journal*.²¹ In defined cases

17. Council Directive 89/665, 1989 O.J. (L 395) 33 (EC) [hereinafter Remedies Directive] (as amended by Council Directive 92/50, *supra* note 13), and Council Directive 92/13, 1992 O.J. (L 76) 7 (EEC) [hereinafter Utilities Remedies Directive].

18. For further detail, see Sue Arrowsmith, *Enforcing the Public Procurement Rules: Legal Remedies in the Court of Justice and the National Courts*, in REMEDIES FOR ENFORCING THE PUBLIC PROCUREMENT RULES 1 (Sue Arrowsmith ed., 1993); PUBLIC PROCUREMENT IN EUROPE: ENFORCEMENT AND REMEDIES (Alan Tyrrell & Becket Bedford eds., 1997); Laurence Gormley, *The New System of Remedies in Procurement by the Utilities*, 1 PUB. PROCUREMENT L. REV. 259 (1992); Stephen Weatherill, *National Remedies and Equal Access to Public Procurement*, 10 Y.B. EUR. L. 243 (1990). See ARROWSMITH, *supra* note 1, ¶ 21.23 and the literature cited there. There is a provision for a slightly different system for utilities as an alternative.

19. For a detailed analysis, see ARROWSMITH, *supra* note 1, *passim*; for a further outline, see Verdeaux, *supra* note 2, at 726–35.

20. Although a tender can, of course, be rejected if it is not compliant (responsive) or the tenderer is not qualified for the contract (responsible).

21. In this respect the procedure referred to as the restricted procedure in the EC directives is very different from the procedure referred to as the restricted procedure under the U.N. Comm. on Int'l Trade Law (UNCITRAL), *UNCITRAL Model Law on Procurement of Goods, Construction and Services* (1994); the latter allows selection simply from known firms without advertising. The similarity of the names given to these very different procedures often causes

set out in the directive, procuring entities also may use more flexible competitive procedures that involve greater scope for dialogue. One of these procedures is the competitive dialogue procedure, introduced in 2004. This procedure is designed for the case in which the procuring entity cannot readily identify the best solution to its needs without a dialogue with suppliers. The other flexible competitive procedure is the negotiated procedure with a contract notice, which is available on a number of grounds, including in certain cases in which the procuring entity cannot set specifications, and for certain research and development contracts. Both competitive dialogue and the negotiated procedure with a notice, like open or restricted procedures, must commence with a notice in the *Official Journal*, but the award procedure is more flexible. The competitive dialogue is a relatively structured procedure, which requires the contractor to be selected on the basis of a formal tendering stage. However, it is more flexible than open or restricted procedures in particular in that it is sometimes permitted to invite only three bidders (which is important in complex procedures in which costs of bidding are high); the number of participants may be reduced through successive tendering stages; there is extensive scope for dialogue, at least before final tenders; and it is not necessary to set a single specification for all tenderers.²² The negotiated procedure with a contract notice is a relatively unstructured procedure that allows for the winner to be chosen, if desired, on the basis simply of competitive negotiations, although the procuring entity must still adhere to the rules set out below on selection criteria, award criteria, specifications, etc.²³ In exceptional cases only,²⁴ entities may award contracts using a negotiated procedure without a contract notice, which does not normally require either an advertisement or any form of competition. As noted above, this applies, for example, in certain cases of extreme urgency.

For contracts covered by the Utilities Directive, entities may use the open procedure, restricted procedure, or negotiated procedure with a notice for any contract: in contrast with the position under the Public Sector Directive, the circumstances in which the negotiated procedure with a notice may be used are not limited to defined cases set out in the directive. As with the public sector, in exceptional cases only, entities may award contracts using a negotiated procedure without a contract notice.²⁵

The third procedural requirement is an obligation to select suppliers for participation in restricted procedures, competitive dialogue, or negotiated

misunderstandings over the nature of the procedure in EC law by those who have experience with the UNCITRAL Model Law, and vice versa.

22. On this new procedure, see ARROWSMITH, *supra* note 1, ch. 10; Adrian Brown, *The Impact of the New Directive on Large Infrastructure Projects: Competitive Dialogue or Better the Devil You Know*, 13 PUB. PROCUREMENT L. REV. 160 (2004); Steen Treumer, *Competitive Dialogue*, 13 PUB. PROCUREMENT L. REV. 178 (2004).

23. For details, see ARROWSMITH, *supra* note 1, ch. 8.

24. Public Sector Directive, *supra* note 12, at art. 31.

25. Utilities Directive, *supra* note 15, at art. 40(3).

procedures with a notice using only certain objective criteria, which must be disclosed to interested suppliers in advance.²⁶

Fourth, under the directives, there is an obligation to award contracts using only award criteria permitted by the directives. The directives allow entities to base the award either on the lowest-priced tender or the most economically advantageous tender.²⁷ The criteria used must be linked to the subject matter of the contract, and the criteria and their weighting must be disclosed to suppliers in advance.²⁸

A fifth procedural requirement is the requirement to allow certain minimum time limits for each phase of a procurement to ensure that suppliers from other Member States have time to participate.²⁹

Sixth, the directives include requirements governing the specifications. These obligations include a requirement to formulate specifications by reference *either* to performance or functional requirements *or* to certain designated standards (most importantly, national standards implementing European standards, or international standards).³⁰

Finally, there are various explicit requirements to provide information on the procedure. These requirements include an obligation to inform participants when an award is made or a procedure is terminated, an obligation to provide (on request) reasons for key decisions, and an obligation to publish notices in the *Official Journal* giving details of contract awards.³¹

These procedural rules must be implemented in the domestic legal system of each Member State in a form in which they can be legally enforced by suppliers.³²

B. *The 2004 Reforms to the EC Procurement Directives*³³

As mentioned above, in 2004 the EC adopted two new directives, which (except for the directive on remedies) almost entirely replaced its previous secondary legislation on public procurement. This major reform had its ori-

26. Under the Public Sector Directive, *supra* note 12, these are limited to specific criteria referred to in the directive, including technical capability and financial and economic position: *see* Public Sector Directive, *supra* note 12, at arts. 44–52; *and* ARROWSMITH, *supra* note 1, ¶ 7.51, ch. 12. The Utilities Directive, *supra* note 15, merely provides for use of “objective” rules and criteria; *see*, in particular, arts. 51 and 54 of the Utilities Directive, *supra* note 15.

27. Public Sector Directive, *supra* note 12, at art. 53; Utilities Directive, *supra* note 15, at art. 55.

28. Public Sector Directive, *supra* note 12, at art. 53; Utilities Directive, *supra* note 15, at art. 55.

29. *See* Public Sector Directive, *supra* note 12, at art. 38; Utilities Directive, *supra* note 15, at art. 45.

30. *See* Public Sector Directive, *supra* note 12, at art. 23; Utilities Directive, *supra* note 15, at art. 34.

31. *See* Public Sector Directive, *supra* note 12, at arts. 41, 53; Utilities Directive, *supra* note 15, at arts. 43, 49.

32. Case 239/85, *Commission v. Belgium*, 1986 E.C.R. 3645; Case C-59/89, *Commission v. Germany*, 1991 E.C.R. I-2607.

33. On the changes introduced, *see, generally*, ARROWSMITH, *supra* note 1, ¶ 3.30, chs. 5–19 *passim*; *An Assessment of the New Legislative Package*, *supra* note 12; THE NEW EU PUBLIC PROCUREMENT DIRECTIVES, *supra* note 12.

gins in a Green Paper of 1996, *Public Procurement in the European Union: Exploring the Way Forward*,³⁴ discussing the future of EC policy on procurement. In this paper, the Commission did not envisage that many, if any, changes would be made to the legislation itself, but rather that the focus of future activity would be on nonlegal measures, such as training on the legislation. According to the Green Paper, “a period of stability in this framework is desirable and it is not therefore intended to make any fundamental change.”³⁵ However, the response to the Green Paper was overwhelming in the view that there was a need for significant legal reform. This need was accepted by the Commission in its Communication *Public Procurement in the European Union*,³⁶ issued as a follow-up to the Green Paper. In this document, the Commission announced an intention to introduce a new “legislative package” with two main aims: the first was to simplify the rules (involving both clarification through guidance³⁷ and, where necessary, legal amendments),³⁸ the second was to increase the flexibility available to procuring entities, in order to take account of “new practices or market reality.”³⁹

So far as the first aim of simplification was concerned, measures taken in the new directives included consolidating the Works, Supply and Services Directives into a single Public Sector Directive, as already mentioned; reordering the provisions in the directives so that they follow the stages of a procurement award procedure; writing into the directives some of the rules of interpretation previously laid down by the ECJ; and expressing all the financial thresholds for applying the rules solely in Euros. (Previously, thresholds had been expressed in SDRs for contracts covered by the GPA). Whether the overall effect of the package is to simplify the rules is highly debatable given the poor drafting of some of the “clarifying” measures and the complexities and uncertainties created by many of the new provisions.⁴⁰

The second main aim of the new legislation, increased flexibility, was perceived as necessary to adapt the directives to important practical developments. These were, in particular, the liberalization of utility markets, the growth of public-private partnerships, and the use of electronic means in public procurement.

As to the first, several important reforms were introduced to exclude from the Utilities Directive utilities that are subject to competitive market pressures, and that are therefore likely to purchase in a commercial manner—

34. *Commission Green Paper on Public Procurement in the European Union: Exploring the Way Forward*, COM (1996) 583 final (Nov. 27, 1996).

35. *Id.* ¶ 6.

36. *Commission Communication on Public Procurement in the European Union*, COM (1998) 143 final (Nov. 3, 1998).

37. The main guidance is on secondary policies, discussed in section 12 *infra*, and guidance on concessions. See Commission Interpretative Communication on Concessions under Community Law, 2000 O.J. (C 121) 2 (EC).

38. *Id.* at 3.

39. *Id.*

40. See *An Assessment of the New Legislative Package*, *supra* note 12.

including without discriminating in favor of national industry—without bureaucratic regulation. This reform was considered necessary in light of the extensive liberalization that had occurred in Europe in many of the regulated utility industries since the Utilities Directive was first adopted in 1990. First, as mentioned above, the telecommunications sector was excluded altogether in view of the EC-wide liberalization of the telecommunications market.⁴¹ Secondly, the Directive adopted a new definition of special and exclusive rights, which is intended to exclude from the directive private entities operating in sectors open to competition.⁴² Thirdly, a new mechanism, set out in Article 30 of the Utilities Directive, provides for the Commission to exclude all entities of a Member State carrying out a particular utility activity when the activity is carried out in that Member State under conditions of competition.⁴³ In the author's view, these provisions represent the most significant positive achievements of the legislative package.

So far as public-private partnerships are concerned, the main reform was the introduction into the Public Sector Directive⁴⁴ of the new competitive dialogue procedure.⁴⁵ As mentioned above, this is designed for cases in which the procuring entity needs to engage in dialogue with tenderers because it cannot by itself define the best solution to its requirements. The procedure was adopted in response to problems that were perceived to exist in awarding, in particular, privately financed infrastructure projects,⁴⁶ which have recently grown in importance throughout the EC. Many of these projects—such as long-term contracts for the private sector to build and operate facilities for schools, prisons, and hospitals—fall within the usual procedures of the procurement directives (although, as explained below, “concession” projects in which the contractor is remunerated by users—for example, toll roads—generally do not). It was considered that the open and restricted procedures were too inflexible for such projects, and that the grounds for using the negotiated

41. All reference to coverage of this sector was removed from the Utilities Directive, *supra* note 15, and an exemption for the sector provided in Article 13 of the Public Sector Directive, *supra* note 12. Previously telecommunications entities in the Member States had been outside the Utilities Directive because of a specific exemption in Article 8 of Directive 93/38, the old Utilities Directive, for entities providing services in competitive markets. See Communication from the Commission Pursuant to Article 8 of Directive 93/38, List of Services Regarded as Excluded from the Scope of Council Directive 93/38 of 14 June 1993 Coordinating the Procurement Procedures of Entities Operating in the Water, Energy, Transport and Telecommunications Sectors Pursuant to Article 8 Thereof, 2004 O.J. (C 115) 7, updating an earlier more limited list, 1999 O.J. (C 156) 3.

42. The definition is found in Article 2(3) of the Utilities Directive, *supra* note 15, and important guidance as to its meaning in recital 25. See ARROWSMITH, *supra* note 1, ¶¶ 15.15 *et seq.*

43. See ARROWSMITH, *supra* note 1, ¶ 15.54. Previously, there were exemptions of this kind only for specific sectors, namely telecommunications, bus transport, and (in a slightly different form) the oil and gas sector; the present author had advocated a more general exemption for some years. See Sue Arrowsmith, *Deregulation of Utilities Procurement in the Changing Economy: Toward a Principled Approach?* 7 EUR. COMP. L. REV 420 (1997).

44. This procedure was not needed for utilities since the same process can be followed using the negotiated procedure with a notice, which is freely available to utilities.

45. See sources cited *supra* note 22.

46. As explained *infra*, the procedure is not limited to these projects.

procedure with a notice—which does provide the requisite flexibility—might not always apply. As noted above, competitive dialogue provides a procedure that, in comparison with the negotiated procedure with a notice, is relatively structured (and hence relatively transparent), but offers a number of advantages over open or restricted procedures for obtaining the best deal and reducing procedural costs in complex procurements.⁴⁷

As to the third reason for increased flexibility, namely, the need to take account of the development of electronic procurement techniques, the new directives contain several new sets of provisions.⁴⁸ First, they make it clear that electronic communications can be used for most communications and also, importantly, that procuring entities can, if they choose, *require* suppliers to use electronic means.⁴⁹ At the same time, however, the directives contain new rules to regulate use of these means.⁵⁰ Secondly, the directives reduce the minimum time limits set for various phases of the procedure, to take account of the time saved using electronic means. For example, the usual minimum time limits for tendering may be reduced by five days when entities provide direct electronic access to the contract specifications,⁵¹ since this reduces the time needed to access the specification and to prepare tenders. Thirdly, the directives contain express provisions authorizing the use of an electronic reverse auction phase in most award procedures.⁵² Finally, the directives introduce a new mechanism for repeat standard purchases, “the dynamic purchasing system.”⁵³ This system authorizes entities to establish, using electronic means, a list of suppliers interested in supplying certain standard supplies or

47. The main advantages are listed in Section II, *supra*.

48. See, generally, Roger Bickerstaff, *The New Directives' Rules on E-communication Mechanisms in Public and Utilities Procurement*, 13 PUB. PROCUREMENT L. REV. 277 (2004) [hereinafter Bickerstaff, *New Directives*]; ARROWSMITH, *supra* note 1, ch. 18; *Commission Staff Working Document on Requirements for Conducting Public Procurement Using Electronic Means Under the New Public Procurement Directives 2004/18/EC and 2004/17/EC*, SEC (2005) 959, (July 8, 2005), available at <http://simap.eu.int>; Roger Bickerstaff, *Commission Staff Working Document on the Requirements for Conducting Public Procurement Using Electronic Means*, 1 PUB. PROCUREMENT L. REV. 277 (2006) [hereinafter Bickerstaff, *Requirements*].

49. Public Sector Directive, *supra* note 12, at arts. 42, 71; Utilities Directive, *supra* note 15, at arts. 48, 64.

50. Public Sector Directive, *supra* note 12, at arts. 42, 71; Utilities Directive, *supra* note 15, at arts. 48, 64. For more discussion, see Bickerstaff, *New Directives*, *supra* note 48; ARROWSMITH, *supra* note 1, ¶ 18.12.

51. Public Sector Directive, *supra* note 12, at art. 38(6); Utilities Directive, *supra* note 15, at art. 45(6).

52. Public Sector Directive, *supra* note 12, at art. 54; Utilities Directive, *supra* note 15, at art. 56. See also Sue Arrowsmith, *Electronic Reverse Auctions Under the EC Public Procurement Rules: Current Possibilities and Future Prospects*, 14 PUB. PROCUREMENT L. REV. 203, 204 (2005) [hereinafter Arrowsmith, *Electronic Reverse Auctions Under the EC Public Procurement Rules*]; Christopher R. Yukins & Don Wallace Jr., *UNCITRAL Considers Electronic Reverse Auctions as Comparative Public Procurement Comes of Age in the United States*, 14 PUB. PROCUREMENT L. REV. 183, 191 (2005).

53. Public Sector Directive, *supra* note 12, at art. 33; Utilities Directive, *supra* note 15, at art. 15. See Sue Arrowsmith, *Dynamic Purchasing Systems Under the New EC Procurement Directives—A Not So Dynamic Concept?* 1 PUB. PROCUREMENT L. REV. 16 (2006) [hereinafter Arrowsmith, *Dynamic Purchasing Systems Under the New EC Procurement Directives*].

services. To register, suppliers must submit a compliant (responsive) tender for the product or service in question; and all qualified (responsible) firms who submit such a tender must be admitted to the system. However, when the procuring entity wishes to place an order under the system, it cannot simply select a tender from the system, but must place a new simplified notice of the dynamic purchasing system in the *Official Journal*, allow new suppliers to register, and then seek tenders for the particular order from all the registered suppliers—a cumbersome procedure.

A further important reform directed at increasing flexibility is the inclusion of explicit provisions in the Public Sector Directive on the use of what the directives call “framework agreements.” These agreements are set up for repeat purchases, for cases in which the exact nature and/or quantity of requirements is not necessarily known when the arrangement is set up. These correspond broadly to the arrangements referred to as task-order contracts under the U.S. federal procurement system. Such agreements may be set up with one supplier, or with more than one supplier (the framework supplier(s)). The framework suppliers are chosen after submitting to the procuring entity the terms on which they can supply the product or service in question. In the case of frameworks with more than one supplier, the procuring entity can select a supplier from among the framework suppliers once the entity knows the precise nature and timing of a particular requirement. The Utilities Directive has always included explicit provisions that authorize and regulate framework agreements,⁵⁴ but until 2004 there were no explicit provisions on this subject in the public sector directives.

The new Public Sector Directive makes it clear that a procuring entity can use frameworks, sets out rules for their operation, and adapts some of the existing rules of the directive (such as those on the financial thresholds above which the directive applies) to the specific context of frameworks.⁵⁵ As with an auction, a framework is not a separate award procedure, but merely a way of conducting part of a standard award procedure (which under the Public Sector Directive will generally be an open or restricted procedure). In the case of frameworks involving more than one framework supplier, a key requirement of the Public Sector Directive is that the supplier for any particular order must be selected by one of two methods. The first is on the basis of the original tenders that were used to select the framework supplier: the procuring entity will simply look back to those tenders and apply the prestated award criteria to establish which of the tenders from the framework suppliers is the lowest priced/most economically advantageous tender for the particular requirement that has arisen. The second basis for selection is by holding a formal “mini-tender” involving all the framework suppliers. This latter basis allows the procuring entity to take account of matters that could not be addressed in the original tenders—for example, with a framework for consul-

54. These are now set out mainly in the new Utilities Directive, *supra* note 15.

55. On frameworks under the new directive, *see* ARROWSMITH, *supra* note 1, ch.11.

tancy services, a supplier's proposed methodology for addressing a particular consultancy project.⁵⁶

The directives also contain some other reforms aimed at improving flexibility. These reforms include a new provision allowing Member States to reserve contracts for sheltered workshops or sheltered employment programs for persons with disabilities;⁵⁷ extended exemptions for utilities purchasing from companies in the same group or contracting with joint venture partners;⁵⁸ a new provision allowing entities to purchase from other public bodies acting as central procuring bodies;⁵⁹ and a provision under the Public Sector Directive for dispensing with competition when supplies are purchased on a commodity market or bargains are available in an insolvency sale.⁶⁰

The adoption of the new directives was driven mainly by stakeholders' perceived need for greater simplicity and flexibility, and was "marketed" by the Commission largely on this basis, as illustrated by the emphasis on these objectives in the Communication that launched the reform. In addition, however, the legislative package as finally adopted also included many measures providing for *tighter* regulation of the procurement process, or for common policies on certain issues.

Most notably, for both the public sector and utilities, there are additional explicit transparency requirements. One is a requirement that entities normally should formulate weightings for the award criteria, and disclose these weightings to bidders in the contract notice or documents;⁶¹ previously, it was necessary merely to list the criteria in order of importance. There are also requirements concerning the disclosure of qualification and selection criteria.⁶² Other procedural changes concern time limits. Both new directives contain an explicit new provision requiring entities to take account of the complexity of the contract and time needed to tender when setting time limits for a procedure, as well as adhering to specific minimum limits.⁶³ There are ex-

56. Whether it is ever possible to use mini-tenders to change terms tendered in the original framework (for example, to change prices to take account of market changes) is not clear under the new directive; see the discussion in ARROWSMITH, *supra* note 1, ¶ 11.47.

57. Public Sector Directive, *supra* note 12, at art. 19; Utilities Directive, *supra* note 15, at art. 28.

58. Utilities Directive, *supra* note 15, at art. 23. For more on the extension, see ARROWSMITH, *supra* note 1, ¶ 15.126.

59. See Public Sector Directive, *supra* note 12, at arts. 1(10), 11; Utilities Directive, *supra* note 15, at arts. 1(8), 29.

60. Utilities Directive, *supra* note 15, at art. 31(2)(c), (d).

61. Public Sector Directive, *supra* note 12, at art. 53(2); Utilities Directive, *supra* note 15, at art. 55(2). There is an exception to the obligation to set out weightings for cases for which, in the opinion of the procuring entity, it is not possible for demonstrable reasons; in this case, the criteria must simply be set out in order of importance.

62. Public Sector Directive, *supra* note 12, at art. 44(2) (obligation to disclose any minimum capacity levels required to prove financial or technical capability), and art. 44(3) (obligation to disclose criteria for selecting those to participate in restricted procedures, negotiated procedures with a notice, and competitive dialogue).

63. Public Sector Directive, *supra* note 12, at art. 38(1); Utilities Directive, *supra* note 15, at art. 45(1).

plicit new rules on confidentiality of certain supplier information.⁶⁴ There is also a new obligation for utilities to inform participants as soon as possible of any decision not to go ahead with the procurement, and of the grounds for the decision (an obligation previously applying only under the public sector rules).⁶⁵

The new directives also impose an *obligation* on public bodies⁶⁶ to exclude from contracts firms convicted of certain criminal offenses connected with organized crime, money laundering, fraud on the Community, and corruption in public contracts, to support the Community's policies on these issues. Member States of the EC, like the United States and many other countries, have long used procurement to support domestic social, environmental, or other policies, and under the directives retain the possibility of doing this to some extent, including by excluding firms convicted of any criminal offense (including environmental offenses, violations of labor law, etc., as well as the offenses listed above). However, this incident is the first time that the Community directives have been employed to implement "secondary" (or "collateral") policies in public procurement on an EC-wide basis, by *requiring* exclusions in certain cases.

Apart from the extension of the Utilities Directive to cover postal services, already mentioned above, the new legislative package does not much extend the coverage of the directives. However, a previous exclusion for purchase of telecommunications services has been removed, in view of the fact that such services can now be purchased in a competitive market (which was not the case when the directives were first adopted).

III. TOWARD A COMMON APPROACH: THE PROCEDURAL RULES UNDER THE EC PROCUREMENT DIRECTIVES

A. Introduction

The rules on contract award procedures under the EC directives—like those of the WTO Agreement on Government Procurement—appear skeletal in comparison with the procurement laws of many national governments. The directives do not deal explicitly with many of the issues often covered in national rules. For example, they do not cover the conditions in which entities

64. Public Sector Directive, *supra* note 12, at art. 42(3); Utilities Directive, *supra* note 15, at art. 48(3).

65. Utilities Directive, *supra* note 15, at art. 49(1). In addition, obligations to inform participants of the award decision and the obligation to give reasons to participants for decisions, which previously applied only to utility sectors covered by the GPA, have been extended to all covered utility sectors. See Utilities Directive, *supra* note 15, at art. 49(1), (2).

66. Public Sector Directive, *supra* note 12, at art. 45(1); Utilities Directive, *supra* note 15, at art. 54(4). Under the Utilities Directive, *supra* note 15, the obligation to exclude applies only to entities covered as contracting authorities, not those covered by the directive merely because they are public undertakings or have special or exclusive rights.

may use certain procurement techniques, such as auctions⁶⁷ or frameworks, the circumstances in which entities should restrict the number of tenderers, the treatment of late or noncompliant tender, or the scope for post-tender discussions.⁶⁸

In principle, Member States have the freedom to lay down their own rules on these and other matters. It was emphasized by the ECJ nearly 20 years ago in the cases of *CEI* and *Beentjes*⁶⁹ that the EC directives do not provide a comprehensive set of rules governing public procurement in the Member States. For example, the court in *Beentjes* stated:

The [1971 Works Directive] does not lay down a uniform and exhaustive body of Community rules: within the framework of the common rules which it contains, the Member States remain free to maintain or adopt substantive and procedural rules in regard to public works contracts on condition that they comply with all the relevant provisions of Community law.⁷⁰

The framework character of the directives—and the importance of preserving the discretion of Member States within that framework—is emphasized in the preamble to the Public Sector Directive, which states that the EC provisions “should comply as far as possible with current procedures and practices in each of the Member States.”⁷¹

In practice, many Member States (although not all)⁷² have extensive additional rules in national law to further their domestic procurement objectives. Key among these objectives in almost all systems are value for money (ensuring that government requirements are met on the best possible terms); integrity (including preventing corruption and conflicts of interest); accountability; the promotion of secondary (collateral) policies such as social or environmental objectives; and ensuring an efficient procurement process in

67. Except that for auctions, art. 1(7) of the Public Sector Directive, *supra* note 12, and art. 1(6) of the Utilities Directive, *supra* note 15, include, following the definition of an electronic auction as a repetitive process involving automatic ranking, the following sentence: “Consequently, certain service contracts and certain works contracts having as their subject-matter intellectual services such as the design of works, may not be the object of electronic auctions.” This possibly indicates that electronic auctions cannot be used in award procedures for some contracts for intellectual services, because of the impossibility of automatic ranking. However, the better interpretation, in the view of the present author, is simply that auctions cannot be used for these services to the extent that the procuring entity considers automatic ranking to be inappropriate in the specific case. On the difficulties of interpreting this provision, see ARROWSMITH, *supra* note 1, ¶¶ 18.40–41.

68. Other than limited and vague provisions in the case of competitive dialogue, see art. 29(5) and (6) of the Public Sector Directive, *supra* note 12.

69. Joined Cases 27–29/86, *SA Construction et Entreprises Industrielles v. Societe Cooperative ‘Association Intercommunales pour les Autoroutes des Ardennes,’* 1987 E.C.R. 3347, 3373; Case 31/87, *Gebroeders Beentjes BV v. Netherlands*, 1988 E.C.R. 4635, 4657.

70. *Beentjes*, 1988 E.C.R. at 4657.

71. Public Sector Directive, *supra* note 12, at recital 3. See also Supply Directive, *supra* note 13, at recital 6; Works Directive, *supra* note 13, at recital 3.

72. For example, the United Kingdom has very few legislative rules, apart from those implementing the EC procurement directives. See ARROWSMITH, *supra* note 1, ch. 2.

terms of time, administrative cost, etc.⁷³ National procurement rules often contain many provisions directed at these objectives, addressing issues that the directives do not expressly cover. A different approach to these issues may be appropriate in different states, to take account of different circumstances.⁷⁴ In particular, the optimum level of discretion left to procurement officials will vary.⁷⁵ For example, states with highly-trained procurement officers and a low level of corruption may consider that value for money is better obtained by allowing a broad discretion for negotiations with suppliers than by limiting negotiations, taking the view that any discretion will be exercised in a commercial and bona fide manner, to enhance the quality of a deal; while other states may prefer to eliminate such discretion, despite its potential advantages, because of the danger of poor judgment or corrupt behavior. Further, to a certain extent, a trade-off is required between objectives, and the balance struck will vary according to the relative priority that they are given—a state that places a particularly high value on integrity, for example, may accept higher process costs to achieve that objective than would be acceptable in other countries.⁷⁶

The outline nature of the directives' explicit procedures appears at first sight to leave considerable room for Member States to supplement the EC rules. However, despite the emphasis given to national practices and procedures in the preambles to the directives, the actual scope for national discretion is now quite limited and rapidly diminishing. This situation has occurred mainly as a result of judicial interpretation. In addition, despite the lip service paid to flexibility as a key-driver of the new directives, which generally implies a broader scope for Member States to make their own choices,⁷⁷ overall the new directives arguably reduce the scope for Member State control over award procedures. These developments will now be considered in turn.

73. See, generally, SUE ARROWSMITH ET AL., REGULATING PUBLIC PROCUREMENT: NATIONAL AND INTERNATIONAL PERSPECTIVES 27 (2000); STEVEN L. SCHOONER, *Desiderata: Objectives for a System of Government Contract Law*, 11 PUB. PROCUREMENT L. REV. 103 (2002); PETER TREPTE, REGULATING PROCUREMENT: UNDERSTANDING THE ENDS AND MEANS OF PUBLIC PROCUREMENT REGULATION (2004).

74. See ARROWSMITH ET AL., *supra* note 73, at 20–23, ch.2; see also SUE ARROWSMITH, *The E.C. Procurement Directives, National Procurement Policies and Better Governance: The Case for a New Approach*, 27 EUR. L. REV. 3 (2002).

75. On this debate in the context of U.S. procurement, see STEVEN KELMAN, PROCUREMENT AND PUBLIC MANAGEMENT: THE FEAR OF DISCRETION AND THE QUALITY OF GOVERNMENT PERFORMANCE (1990); STEVEN L. SCHOONER, *Commercial Purchasing: The Chasm Between the United States Government's Evolving Policy and Practice*, in PUBLIC PROCUREMENT: THE CONTINUING REVOLUTION (Sue Arrowsmith & Martin Trybus eds., 2003); STEVEN L. SCHOONER, *Fear of Oversight: The Fundamental Failure of Businesslike Government*, 50 AM. U.L. REV. 627 (2001); JOSEPH A. PEGNATO, *Assessing Federal Procurement Reform: Has the Procurement Pendulum Stopped Swinging?* 3 J. PUB. PROCUREMENT 145 (2003).

76. On the relationship between the various objectives, see, generally, ARROWSMITH ET AL., *supra* note 73; SCHOONER, *supra* note 73; TREPTE, *supra* note 73.

77. States generally may impose stricter rules than those in the directives, but only in very limited cases require Member States to allow flexibility for their own procuring entities. On this point in detail, see ARROWSMITH, *supra* note 1, ¶ 3.13.

B. *Judicial Interpretation of the Directives*

So far as judicial interpretation is concerned, one of the earliest areas in which the public sector directives have been held to restrict national discretion is that of social and environmental policies.⁷⁸ Some of these policies, such as those promoting deprived regions, are precluded by the EC Treaty, but the Treaty still leaves some room for those policies promoting racial and gender equality, and environmental objectives.⁷⁹ However, even with policies permitted under the Treaty, the ECJ's narrow interpretation of the directives means that Member States are severely limited in the mechanisms they may use for implementing such policies. First, the ECJ has interpreted the public sector rules as precluding Member States from excluding suppliers merely because those suppliers have failed to comply with social policies formulated by the procuring entity (such as fair recruitment policies), or because the procuring entity believes the supplier will be unable to comply with a contract condition of a social or environmental nature (for example, requiring use of certain disadvantaged workers on the contract). In the latter case, the procuring entity must allow the supplier to conclude the contract and then take action only if the supplier does not actually comply (which may be impractical or costly). Such a restriction is not written into the public sector rules, but the ECJ has concluded that the grounds for exclusion referred to in the public sector rules—namely, technical capability, financial standing, and criminal convictions—are generally exhaustive.⁸⁰

Secondly, the ECJ has ruled that award criteria must relate to the subject matter of the contract.⁸¹ Thus, for example, in relation to a contract for procurement of energy, it is not possible to give a preference at the award stage based on the amount of electricity that a firm provides from renewable energy sources in its business overall simply to encourage the market to generate more energy from renewable sources.⁸² This principle has been written into

78. There is significant literature on this issue. For literature in English that covers the new directives as well as the old: see ARROWSMITH, *supra* note 1, ch. 19 (which provides more extensive literature references); Peter Kunzlik, *Green Procurement under the New Regime*, in THE NEW EU PUBLIC PROCUREMENT DIRECTIVES, *supra* note 12; Niklas Bruun & Brian Bercusson, *Labour Law Aspects of Public Procurement in the EU*, in THE NEW EU PUBLIC PROCUREMENT DIRECTIVES, *supra* note 12, at 97; Joel Arnould, *Secondary Policies in Public Procurement: The Innovations of the New Directives*, 13 PUB. PROCUREMENT L. REV. 187 (2004).

79. For a review of the impact of the Treaty on secondary policies, see ARROWSMITH, *supra* note 1, ¶ 19.31.

80. Case 31/87, *Gebroeders Beentjes BV v. Netherlands*, 1988 E.C.R. 4635, 4657; Case C-360/89, *Commission v. Italian Republic*, 1992 E.C.R. I-3401. It appears now to admit an exception for exclusions made to ensure equal treatment of participants: see Case C-21/03, *Fabricom v. Etat belge*, 2005 E.C.R. I-1559. Under the listed grounds, firms can be excluded for “secondary” reasons for noncompliance with social policies only when this has resulted in a criminal conviction or can be considered as “grave misconduct.”

81. Case C-513/99, *Concordia Bus Finland v. Helsinki*, 2002 E.C.R. I-7213, I-7286.

82. Case C-448/01, *EVN & Wienstrom v. Austria*, 2003 E.C.R. I-14527, ¶ 68. However, if the contract requires energy to be provided from renewable sources, the amount available to the entity may be relevant to the extent that it is related to security of supply from such sources.

both new directives.⁸³ There has been much debate over the merits of using procurement to implement “collateral” policies and over the merits of exclusion and contract award criteria as mechanisms for doing so;⁸⁴ but it suffices for the present purpose to point out that, by imposing restrictions on Member States in order to open markets, the ECJ has deprived states of much of their previous freedom to consider if and how to implement such policies in light of their own national circumstances.

More generally, a major development with significant implications for Member States’ discretion in all areas is the ECJ’s recognition of certain legal “principles” underlying the directives. Two principles that have been articulated by the Court, and now written expressly into the new directives, are “equal treatment” and “transparency.” The ECJ has used these principles both to *interpret* the explicit rules of the directives and also to imply *additional* obligations when no explicit rules exist.

The equal treatment principle was stated first by the Court back in 1993 in the case of *Storebaelt*,⁸⁵ which concerned an award procedure for constructing a bridge across the Great Belt, tendered as a restricted procedure. According to the Court, although the directive at that time did not mention any principle of equal treatment, “the duty to observe that principle lies at the very heart of the directive.”⁸⁶ In that case, the Court applied the principle to conclude that it violated the directive to accept a tender that did not comply with a fundamental requirement of the tender documents. (In that case, the tenderer had failed to accept a condition requiring tenderers who submitted their own design for the bridge to accept legal liability for the design.) This principle has now been written expressly into both the new directives: Article 2 of the new Public Sector Directive and Article 10 of the new Utilities Directive state that procuring entities “shall treat economic operators equally.”⁸⁷

In *Storebaelt* and several subsequent cases, the ECJ did not define equal treatment but merely applied it to the facts of the case. However, in the *Fabricom* case in 2005, the Court stated that “the equal treatment principle requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified.”⁸⁸ This requirement for equal treatment under the

83. Public Sector Directive, *supra* note 12, at art. 53(1); Utilities Directive, *supra* note 15, at art. 55(1) (referring to criteria “linked to the subject matter” of the contract).

84. See, generally, ARROWSMITH ET AL., *supra* note 73, at 237–322.

85. Case C-243/89, *Commission v. Denmark (Storebaelt)*, 1993 E.C.R. I-3353, I-3396. In Case C-16/98, *Commission v. France*, 2000 E.C.R. I-8315, ¶¶ 103–109, the ECJ stated that the principle applies “at all stages of the tendering procedure,” and not just when a provider submits a tender.

86. *Storebaelt*, 1993 E.C.R. ¶ 33.

87. And also “non-discriminatory.” It appears that equal treatment refers to the broad principle of equal treatment developed by the ECJ under the directives and described above; non-discrimination refers to nondiscrimination on grounds of nationality, which is one specific manifestation of equal treatment.

88. Case C-21/03, *Fabricom v. Etat belge*, 2005 E.C.R. I-1559, ¶ 27. See also Case C-513/99, *Concordia Bus Finland v. Helsinki*, 2002 E.C.R. I-7213, ¶ 149.

directives is one specific manifestation of the general principle of equal treatment in EC law. This requirement is not, however, a general principle prohibiting all discrimination, in the sense of all unjustified differences in treatment between persons in all situations. Rather, it is a principle manifested in a number of specific Community rules that prohibit discrimination in specific contexts on specific grounds.⁸⁹ The prohibition against discrimination on grounds of nationality under Articles 28, 43, and 49 of the EC Treaty, as discussed above, is one example. However, equal treatment under the directives is not limited to prohibiting discrimination on grounds of nationality: its purpose, according to the ECJ, is to “ensure the development of effective competition,” leading to selection of the best bid.⁹⁰ Thus, it appears that the principle generally forbids *any* different treatment of suppliers who are in a *comparable competitive position*, unless justified. Further, the Court has ruled that it can be invoked by domestic suppliers as well as by suppliers from other Member States.⁹¹

Determining what is a comparable competitive position requires the ECJ to decide which criteria the procuring entity may and may not take into account in deciding to treat two suppliers in a different way—for example, in eliminating one, but not another, from a competition.⁹² This arrangement gives the ECJ a potentially broad discretion in deciding how Member States and entities should balance competing objectives in the procurement process. The width of this discretion is enhanced by the Court’s recognition in *Fabricom* that a principle of proportionality applies to states implementing equal treatment, prohibiting measures that restrict suppliers’ access beyond what is necessary to secure equal treatment.

The broad nature of the Court’s discretion and the consequent potential for limiting Member States’ freedom to balance competing objectives can be illustrated by looking at *Fabricom*⁹³ itself. In this case the ECJ considered whether a procuring entity may exclude from tendering a person who has been involved in preparatory work on that contract, such as by assisting in preparing specifications. This arrangement may be problematic, both because of a risk that specifications will be distorted in favor of that person and because that person may gain information that gives a competitive advantage. In addressing this problem, it is necessary to balance the potential problems of that person’s participation against the entity’s interest in securing available assistance, and, in making this balance, to take account of the procedural costs of

89. See generally TAKIS TRIDIMAS, *THE GENERAL PRINCIPLES OF EC LAW* 40–88 (1999).

90. *Storebaelt*, 1993 E.C.R. ¶ 33.

91. Case C-87/94, *Commission v. Kingdom of Belgium (Walloon Buses)*, 1996 E.C.R. I-2043.

92. Alternatively, the ECJ could approach the question by considering any difference in treatment of those at a certain stage in the competition as involving a difference in treatment of those in a comparable position, and then consider the reasons for it solely at the “justification” stage. However, this concept is mostly invoked in relation to decisions to reduce numbers of persons based solely on administrative convenience rather than based on substantive distinctions based on the persons themselves. See TRIDIMAS, *supra* note 89, at 33.

93. *Fabricom*, 2005 E.C.R. at I-1559.

various approaches. The directives do not contain explicit provisions on this subject.⁹⁴ The ECJ proceedings arose out of proceedings before the Belgian courts, in which Fabricom challenged the provisions of Belgian law⁹⁵ on the issue. Belgian law provided that persons instructed to carry out research, experiments, studies, or development in connection with a contract were not permitted to compete for a contract. It also provided that an undertaking connected with such a person *was* permitted to apply to compete, but only where it could establish that it had not obtained an unfair advantage capable of distorting competition.

The ECJ ruled that the Belgian law prohibiting from tendering all persons who themselves were involved in preparatory work, even if they could show there was no risk for competition, contravened the directives, because it was not proportionate—it went beyond what was necessary to achieve equal treatment. According to the Court, this could be safeguarded by a less restrictive method, namely, by prohibiting participation only by those who are unable to prove that there is no risk to competition.⁹⁶ Interestingly, the ECJ disagreed with Advocate General⁹⁷ Léger, who considered that Belgium's more general rule of exclusion was justified by the need for certainty and transparency.⁹⁸ By applying the proportionality principle, the ECJ overturned the judgment of the Belgian government on how the interest of competition should be balanced with these competing interests of certainty and transparency.

The ECJ indicated that it does not violate equal treatment to exclude a person involved in preparations when the person *cannot* prove that there is no risk to competition. Such a person is not necessarily in the same position as one who has not participated, because of the extra information that that person may have received, or because of the potential for conflict of interest, since such a person may influence the specifications; thus, such a person can be treated differently from one who has not participated in the preparations.⁹⁹ What is not clear, because the ECJ did not expressly consider it, is whether

94. However, recital 8 of the Public Sector Directive, *supra* note 12 (which is relevant in interpreting the directive), states that “before launching a procedure for the award of a contract, contracting authorities may, using a technical dialogue, seek or accept advice which may be used in the preparation of the specifications provided, however, that such advice does not have the effect of precluding competition.” There is a parallel provision in recital 14 of the Utilities Directive, *supra* note 15.

95. The case actually concerned two separate legal provisions, one applying to contracts covered by the public sector rules and one to contracts covered by the utilities rules.

96. Case C-21/03, *Fabricom v. Etat belge*, 2005 E.C.R. I-1559, ¶¶ 32–36.

97. The role of the Advocate General is to deliver an advisory opinion on the case, which generally sets out, discusses, and applies the legal principles in a more detailed manner than the ECJ (the judgments of which are much shorter and more tersely reasoned than those of a typical common law court). The ECJ usually, but not always, follows the Opinion of the Advocate General.

98. *Fabricom*, 2005 E.C.R. ¶¶ 40–44.

99. *Id.* ¶¶ 28–31. As stated by the Advocate General, this appears to be an exception to the general principle previously established by the ECJ in Case 31/87, *Gebroeders Beentjes BV v. Netherlands*, 1988 E.C.R. 4635, and Case C-360/89, *Commission v. Italian Republic*, 1992 E.C.R. I-3401, although the ECJ did not comment on this.

a procuring entity *must* exclude such a person. Clearly, the equal treatment principle could potentially be invoked by the Court as a basis for concluding that such persons *must* be excluded: the Court could take the view that to allow a person whose participation involves such a risk to compete involves the same treatment of cases that are *not* alike, and that this is not justified by the policy of encouraging assistance at the preparatory stages. On the other hand, the Court could conclude alternatively that allowing participation is (or is at least in some cases, depending on the facts) a justified response to the need to encourage assistance.

Fabricom illustrates clearly the potential that the equal treatment principle gives for judicial regulation of matters not referred to in the directives. Although the legislation does not deal expressly with participation in a tendering procedure by those involved in preparation, the ECJ can determine precisely how each aspect of this issue should be dealt with through the equal treatment principle. The actual outcome of the *Fabricom* case—in which the ECJ (unusually) declined to follow the Opinion of the Advocate General—indicates that the ECJ is very ready to intervene to regulate the details of the award process. Further, in interpreting the directives, the ECJ generally has given preference to the values of transparency and openness—which are the directives' means to achieve nondiscrimination—above discretion and administrative cost or convenience.¹⁰⁰ This situation is likely to result in an application of the equal treatment principle that reduces the discretion available to Member States: because Member States may generally enact rules that provide for greater transparency and openness, but not for less, any application of equal treatment that *increases* the level of transparency and openness will diminish the room for the choices by Member States.¹⁰¹

The second general principle developed by the ECJ to interpret and supplement the directives is “transparency,” the role of which is to support the principle of equal treatment.¹⁰² The ECJ has not defined transparency, but,

100. Examples include the principle of narrow interpretation of the grounds for using negotiated procedures without notice (discussed further below) and the strict approach in interpreting the scope of commercial/industrial activities that are excluded from the directives, as discussed in Section IV *infra*. It should be noted, however, that these values may sometimes come into conflict—for example, in deciding whether to admit late tenders or applications.

101. For example, if the equal treatment principle were to lead to a narrow view of the scope for post-tender discussions with suppliers under the various award procedures, all Member States would need to limit the scope for discussions, whereas a broad view would probably allow Member States themselves to choose what the permitted scope of discussions should be. However, as mentioned *supra* note 77, there are at least some cases in which the directives require Member States to allow a certain discretion to their own procuring entities (that is, do not allow stricter standards of transparency than those required by the directives themselves).

102. Case C-19/00, SIAC Construction v. County Council of the County of Mayo, 2001 E.C.R. I-7725, ¶ 41. Transparency in procurement is not an end in itself but a means that can be used to achieve a variety of procurement objectives. See ARROWSMITH ET AL., *supra* note 73, at 73–86; Sue Arrowsmith, *Transparency in Government Procurement: The Objectives of Regulation and the Boundaries of the World Trade Organization*, 37 J. WORLD TRADE 283 (2003) (discussing this concept in relation to the work on procurement in the WTO); TREPTE, *supra* note 73, at 392–94.

as the author has set out elsewhere,¹⁰³ in the context of the directives, it comprises four aspects: publicity for opportunities, publicity for the rules governing each procedure (such as the steps in the procedure, and the award and selection criteria), rule-based decision making, and opportunities for verification and enforcement. An early example of a reference to transparency to interpret the directives is found in *Walloon Buses*, in which the ECJ ruled that when the purchaser fails to comply with the requirement to state the criteria for assessing the most advantageous offer, only the lowest price basis may be used for the award.¹⁰⁴ This could be based on either the second or third facets of transparency mentioned above. An example of the use of transparency by the ECJ to add to the directives is the ruling in *Universale-Bau*.¹⁰⁵ This case was decided under the old Works Directive, which did not contain any rules on disclosure of the criteria for selecting firms to tender. An authority letting a construction contract had indicated to tenderers in outline the approach that it would adopt in deciding which firms to invite; namely, that it would take the five top-ranked candidates and that the ranking would take account of technical operating capacity over the previous five years, by reference to five listed types of works. At the time this information was given to tenderers, the authority also had developed a detailed scoring system (deposited with a notary) on how this capacity had been assessed, but did not disclose this. The ECJ indicated that disclosure was required, ruling that transparency requires that, where the entity has laid down in advance the rules for weighting the selection criteria, it must disclose them.¹⁰⁶ The principle of transparency, like that of equal treatment, has now been written expressly into both the new directives: thus, Article 2 of the new Public Sector Directive and Article 10 of the new Utilities Directive state that procuring entities “shall act in a transparent way.” As with equal treatment, this principle limits the scope of Member States to determine the detailed contents of contract award procedures, by imposing additional EC-level obligations. Further, as with equal treatment, the future scope for judicial regulation through a strict application of this principle, particularly if it covers all four aspects of transparency, is extremely broad.

In addition, the trend toward supplementing the explicit rules in the directives may be enhanced in the future by the ECJ’s recognition of further

103. ARROWSMITH, *supra* note 1, ¶ 3.9.

104. Case C-87/94, Commission v. Kingdom of Belgium (*Walloon Buses*), 1996 E.C.R. I-2043.

105. Case C-470/99, *Universale-Bau v. EBS*, 2002 E.C.R. I-11617.

106. The ECJ did not comment on whether it is necessary actually to develop such a system. As already noted above, the new Public Sector Directive, *supra* note 12, contains some explicit requirements to formulate and disclose the selection criteria. It is not clear whether this now impliedly rules out the obligation stated in *Universale-Bau*, 2002 E.C.R. I-11617, to disclose any selection methodology developed by the procuring entity that is more detailed than that actually required by the directive.

“implied” principles in the directives, such as competition¹⁰⁷ and proportionality.¹⁰⁸

The judicial development of common rules through the application of the general principles is in the very early stages. National legislation implementing the directives and judicial application of the rules in the different Member States are likely to continue to diverge on many points, until the ECJ clarifies the precise application of the principles to different procurement issues. However, the foundations for significant common development are now well established, and the details of these common rules will emerge over the coming years.

C. *The Recent Legislative Reforms*

As explained above, one of the main aims stated for the 2004 reforms was to give Member States increased flexibility in their procurement, to allow them to respond to new market developments. Thus, at first sight, the reforms might appear as a qualification to the claim that EC procurement law is evolving toward a more harmonized set of rules: because States may generally enact stricter rules than those of the directive, greater flexibility will increase the discretion of Member States, which may choose to implement either the more flexible approach or a stricter regime.

While there have been some important reforms to coverage by taking commercial utilities outside the directives, the extent to which the reforms have increased flexibility for contracts that remain *within* the directives is questionable. First, and most obviously, this is because of the new provisions that aim at limiting the discretion of Member States, such as those requiring entities to weight contract award criteria and to formulate and disclose selection criteria. Less obviously, however, even the reforms that purportedly aim at increasing flexibility arguably do not do this. This is largely the position with all three major areas of procedural reform—electronic procurement, framework agreements, and competitive dialogue. In all these cases, to a great extent, the reforms present merely an illusion of increased flexibility; indeed, the overall impact may even be negative in this respect.

In the first two areas, electronic procurement and framework agreements, this position arises because the reforms merely provide explicitly for procurement techniques already permitted, while at the same time tightening control over their use.

So far as electronic procurement is concerned, the new directives make it clear that entities can use electronic communications and can require suppliers

107. In Case C-247/02, *Sintesi SpA v. Autorità per la Vigilanza sui Lavori Pubblici*, 2004 E.C.R. I-9215, ¶ 33, Advocate General Stix-Hackl stated that competition is one of the “fundamental principles” of EC procurement law. See also ARROWSMITH, *supra* note 1, ¶ 7.14.

108. As explained in the text, in Case C-21/03, *Fabricom v. Etat belge*, 2005 E.C.R. I-1559, the ECJ ruled that any application of the equal treatment principle was governed by a proportionality test and it is possible that this will be extended to apply to any procurement decisions governed by the directive, such as decisions to exclude a firm from participating.

to use them. However, this manner of communication was probably possible for most actions under the previous directives.¹⁰⁹ For most actions, the directives did not regulate the means of communication at all, leaving this to be determined by Member States. While in a few cases the directives did require “writing” for certain actions, it seems likely that the ECJ would have interpreted this as covering electronic communications that had the relevant functional characteristics of hard copy, such as providing a permanent record. Thus, the new directives do not add any significant new possibilities for procuring entities. On the other hand, along with these “authorizing” provisions, the new directives set out detailed controls over electronic communications that did *not* previously apply. For example, the directives now state that entities must ensure that integrity of data and confidentiality of tenders and requests to participate are preserved, and set out detailed provisions for ensuring this result, such as a requirement that the time and date of receipt of tenders and requests can be determined. These provisions reduce the discretion of Member States to balance considerations of integrity and confidentiality, on the one hand, against, on the other, the adverse effect on competition that may result from requiring firms to comply with technical requirements.¹¹⁰ In addition, the Commission has stated that the new provisions limit the discretion of Member States by prohibiting them from limiting the rights of their own procuring entities to use electronic means.¹¹¹ Overall, the new provisions on electronic communications appear to restrict the choices available to Member States.

The same can be said of the new provisions on electronic auctions. While the directives now explicitly provide for use of electronic auctions, this arrangement already appeared possible under the previous directives. There was nothing explicit to prohibit auctions, and it was possible to include an electronic auction as part of the procurement process while still complying with all the directives’ detailed rules.¹¹² On this basis, electronic auctions had already been extensively used under the old directives—for example, in the

109. For more detailed analysis, see Sue Arrowsmith, *E-commerce Policy and the EC Procurement Rules: The Chasm Between Rhetoric and Reality*, 38 COMMON MKT. L. REV. 1447, 1450–52 (2001).

110. Although the extent to which this applies will depend on how the courts interpret these detailed rules. See Bickerstaff, *New Directives*, *supra* note 48.

111. *Commission Proposal for a Directive of the European Parliament and of the Council on the Coordination of Procedures for the Award of Public Supply Contracts, Public Service Contracts and Public Works Contracts*, § 2.1, COM (2000) 275 final (Oct. 5, 2000); see also *Commission Proposal for a Directive of the European Parliament and of the Council Coordinating the Procurement Procedures of Entities Operating in the Water, Energy and Transport Sectors*, § 3.1, COM (2000) 276 final (Oct. 5, 2000).

112. See generally Arrowsmith, *Electronic Reverse Auctions Under the EC Public Procurement Rules*, *supra* note 52, at 304–07. This view was endorsed in the UK by the Office of Government Commerce. See Office of Government Commerce, eAuctions, <http://www.ogc.gov.uk/index.asp?docid=1001034&synNav=1> (last visited Feb. 7, 2006) (“There is no general prohibition on the use of eAuctions with the Open and Restricted Procedures in accordance with EC Directives on Supplies and Services, Utilities and Works.”).

United Kingdom.¹¹³ Thus, while the directives remove any possible doubts over the use of auctions, they do not actually increase flexibility. Further, for utilities, the new rules remove many of the previous flexibilities that utilities could enjoy when using auctions as part of a negotiated procedure. For example, previously, as part of a negotiated procedure, utilities could use an auction to establish a price, and then consider the price along with nonprice elements of tenders (such as quality of service) after the auction. However, the new rules require that, during the auction, there must be automatic re-ranking of suppliers whenever a tender is revised,¹¹⁴ and that it must be apparent to any supplier whether that supplier is currently winning.¹¹⁵ This scheme requires that any nonprice elements must be converted to price-equivalents prior to the auction, so that the auction software can instantly calculate current rankings and provide the relevant information to suppliers. Thus, it is no longer possible to include an auction phase in any award procedure when the utility does not want to adopt a mechanical approach to the comparison of price and nonprice elements. The same rule also precludes utilities from making use of a previous possibility for conducting negotiations with more than one tenderer to improve or fine-tune offers after the auction phase.¹¹⁶

Another innovation of the new rules is the dynamic purchasing system, as described earlier. However, in practice, this system is not likely to be important: the cumbersome procedure described in section II.B above for placing individual orders under a system means that the system is unlikely to be attractive.¹¹⁷

Thus, it can be argued that the only significant way in which the new rules enhance flexibility in respect of electronic procurement is by allowing for reduced time limits to take account of the speed of electronic communications. In other respects, the rules not only fail to enhance flexibility, and,

113. See the examples given in OFFICE OF GOVERNMENT COMMERCE, *EPROCUREMENT: CUTTING THROUGH THE HYPE*, app. A (2002) (for an updated version of this report, see OFFICE OF GOVERNMENT COMMERCE, *EPROCUREMENT IN ACTION: A GUIDE TO EPROCUREMENT FOR THE PUBLIC SECTOR* (2005), http://www.ogc.gov.uk/sdtoolkit/reference/ogc_library/procurement/bluefrog2.pdf).

114. As provided by the definition of an electronic auction in art. 16 of the Public Sector Directive, *supra* note 12, and art. 1(7) of the Utilities Directive, *supra* note 15. This is also implicit in the requirement that features of tenders that suppliers may revise in the auction must be such as to permit automatic evaluation. Public Sector Directive, *supra* note 12, at art. 54(3)(a); Utilities Directive, *supra* note 15, at art. 56(3)(a) (requiring such features to be quantifiable and capable of being expressed in figures and percentages); Public Sector Directive, *supra* note 12, at art. 54(5); Utilities Directive, *supra* note 15, at art. 56(5) (requiring entities to provide the formula to be used to determine automatic rerankings).

115. Public Sector Directive, *supra* note 12, at art. 54(6); Utilities Directive, *supra* note 15, at art. 56(6).

116. This is normally possible when using a negotiated procedure with a notice. See ARROWSMITH, *supra* note 1, ¶ 8.63.

117. See Arrowsmith, *Dynamic Purchasing Systems Under the New EC Procurement Directives*, *supra* note 53, at 16–29.

hence, the discretion of Member States, but in certain important aspects actually restrict flexibility.

In relation to framework agreements, also, the effect of the new provisions mainly is to acknowledge explicitly an option that already applied.¹¹⁸ As with auctions, it appeared possible to operate frameworks, with both a single supplier and several suppliers, within the previous public sector directives, and they were used in various Member States. The decision to add explicit provisions on frameworks resulted from a debate prompted by a complaint to the European Commission against the United Kingdom. The complaint concerned a multiprovider services framework awarded by the Northern Ireland Department of the Environment. Initially, the Commission suggested that frameworks were not permitted at all under the public sector directives,¹¹⁹ giving rise to some concerns among procuring entities and suppliers. Ultimately, the possibility of using certain types of framework was accepted by the Commission.¹²⁰ However, Member States decided to include explicit provisions on frameworks in the new directive, both to remove any lingering doubts over their availability, and to ensure that the rules governing their use were clearly understood. In particular, anecdotal evidence and the experience of the Northern Ireland case suggested that, in the United Kingdom, legal violations were occurring both because the terms of supply were insufficiently complete when the framework was established and because orders were being placed by impermissible methods (for example, by rotating awards between suppliers, in disregard of the directives' requirement to select using the pre-stated contract award criteria relating to the nature of the offer). The main effect of the new provisions may be to ensure that frameworks operate in practice in accordance with the rules that have always applied.

In the third major area of reform, the competitive dialogue procedure, the implications of the directive for flexibility are less clear. As explained above, competitive dialogue was introduced to provide a flexible award procedure for complex contracts, notably those for privately financed infrastructure projects in cases in which it was not clear that the negotiated procedure with a notice was available.¹²¹ This negotiated procedure can be used, *inter alia*, on

118. For further analysis of the position under the previous directives, see Sue Arrowsmith, *Framework Purchasing and Qualification Lists Under the European Procurement Directives*, 8 *PUB. PROCUREMENT L. REV.* 115, 168 (1999).

119. Press Release, Commission, Public Procurement: Infringement Proceedings Against the United Kingdom, Austria, Germany and Portugal IP/97/1178 (Dec. 19, 1997).

120. While in July 2000 the Commission announced its intention to initiate proceedings in the ECJ in respect of the complaint in the Northern Ireland case, the Commission also accepted that frameworks were possible in principle when awarded under the directives' procedures. It intended to initiate proceedings because the terms of the framework in the particular case were insufficiently complete to comply with the Services Directive. See Press Release, Commission, Commission Refers United Kingdom to Court IP/00/813 (July 20, 2000).

121. On the legal issues surrounding procurement procedures for these projects under the old and new directives: see, generally, Sue Arrowsmith, *The European Procurement Rules and Public Private Partnerships: EU Policies in Conflict?* 37 *COMMON MKT. L. REV.* 709 (2000); Peter Braun, *Strict Compliance versus Commercial Reality: The Practical Application of EC Public Procurement Law to the UK's Private Finance Initiative*, 9 *EUR. L.J.* 575 (2003) [hereinafter Braun, *Strict Compliance*].

the grounds that specifications cannot be set with sufficient precision to use open or restricted procedures (for services contracts only)¹²² or when “overall pricing” is not possible.”¹²³ Although the European Commission expressed doubts over whether many privately financed infrastructure procurements fitted within these grounds, arguing, in particular, that the negotiated procedure was an exceptional one that required a narrow interpretation,¹²⁴ in practice the negotiated procedure was widely used for these projects. In particular, in the United Kingdom, which took the lead in developing the private finance approach in Europe,¹²⁵ it was used for almost all of these procurements in the 1980s and 1990s,¹²⁶ an approach heavily influenced by UK government guidance¹²⁷ and endorsed by a decision of the English High Court.¹²⁸ It has become more difficult to argue that a specification for these projects cannot now be set, as experience with their use has grown. Nevertheless, anecdotal evidence suggests that the procedure has continued in widespread use in the UK, and,

versus Commercial Reality]; Peter Braun, *Selection of Bidders and Contract Award Criteria: The Compatibility of Practice in PFI Procurement with European Law*, 10 PUB. PROCUREMENT L. REV. 1 (2001); Jennifer Skilbeck, *The Private Finance Initiative and Public Procurement*, 5 PUB. PROCUREMENT L. REV. 148 (1996); PUBLIC PRIVATE PARTNERSHIPS AND PFI (Penny Badcoe ed., 2000).

122. Public Sector Directive, *supra* note 12, at art. 30(1)(c). This applies only to services contracts, but many contracts for privately financed infrastructure are services contracts since the main object and greater part of the value of the contract is represented by the services (operation, maintenance, etc.) provided over the life of the contract. The same provision applied under the old Services Directive 92/50. For issues of interpretation, see ARROWSMITH, *supra* note 1, ¶ 8.4.

123. Public Sector Directive, *supra* note 12, at art. 30(1)(c). This ground was available before 2004 for services and works contracts only but was extended in 2004 to cover supply contracts also. For issues of interpretation, see ARROWSMITH, *supra* note 1, ¶ 8.9.

124. The ECJ has established that the grounds for using a negotiated procedure without a notice must be narrowly interpreted because they are exceptions to general EC rules, and such exceptions require a narrow interpretation, Case 199/85, *Commission v. Italy*, 1987 E.C.R. 1039. The European Commission has taken the view that this principle of narrow interpretation applies also to the negotiated procedure with a notice.

125. For an overview and further literature references on the UK government's policy in using private finance for infrastructure procurement see ARROWSMITH, *supra* note 1, ¶ 2.16; TREASURY TASKFORCE, PARTNERSHIPS FOR PROSPERITY: THE PRIVATE FINANCE INITIATIVE (1997); STATIONARY OFFICE, PUBLIC PRIVATE PARTNERSHIPS: THE GOVERNMENT'S APPROACH (2000); HM TREASURY, PFI: MEETING THE INVESTMENT CHALLENGE (2003) (for government policy); PUBLIC PRIVATE PARTNERSHIPS AND PFI, *supra* note 121; BUTTERWORTH'S PFI MANUAL (2005); INSTITUTE FOR PUBLIC POLICY RESEARCH (IPPR), BUILDING BETTER PARTNERSHIPS: THE FINAL REPORT OF THE COMMISSION ON PUBLIC PRIVATE PARTNERSHIPS (2001). On PFI in local government, see Penny Badcoe, *Public Private Partnerships in Local Government: The Legal, Financial and Policy Framework*, 8 PUB. PROCUREMENT L. REV. 279 (1999); STEPHEN CIRELL, JOHN BENNETT & ROBERT HANN, THE PFI AND MAJOR STRATEGIC PROCUREMENT IN LOCAL GOVERNMENT (1997); DEP'T OF ENV'T TRANSP. & THE REGIONS, LOCAL GOVERNMENT AND THE PRIVATE FINANCE INITIATIVE (1998). Government documents on PFI are collected together and available at <http://www.hm-treasury.gov.uk>.

126. See Braun, *Strict Compliance versus Commercial Reality*, *supra* note 121, at 575, for a report on the results of an empirical research project on the practice of procurement in privately financed infrastructure.

127. In particular, see TREASURY TASKFORCE, TECHNICAL NOTE No. 2, HOW TO FOLLOW EC PROCUREMENT PROCEDURE AND ADVERTISE IN THE OJEC 8 (1998). On the influence of UK government guidance on UK practice, see the empirical research by Braun, *Strict Compliance versus Commercial Reality*, *supra* note 121.

128. *R v. Rhondda Cynon Taff County Borough Council* [2001] EWHC Admin 527 (Q.B.).

in the absence of any other suitable procedure in the directives, its application might well have been endorsed by the ECJ.

Against this background, the idea of competitive dialogue as an innovation providing greater flexibility takes on a different perspective. With the introduction of the new procedure, it is much less likely that the ECJ will allow use of the negotiated procedure for most privately financed infrastructure projects, so that entities may be compelled to use a less flexible procedure than before. This arrangement will not make such a great difference as might appear at first sight: while the negotiated procedure allows a choice of contracting partner through unstructured negotiations, in practice, entities (at least in the UK) invariably included one or more tendering phases¹²⁹—an approach that, in general, fits with competitive dialogue (and which, in fact, inspired that procedure). However, it is not yet clear whether previous practice can be fully accommodated within competitive dialogue. There are some important gray areas, in particular over whether a tender can be completed and adjusted through negotiations that follow selection of the “preferred bidder,” as is common practice.¹³⁰ If competitive dialogue is interpreted in a restrictive manner, the net impact of the reforms on complex infrastructure projects could be to reduce flexibility in practice. On the other hand, it is true that competitive dialogue does offer a less rigid procedure for certain complex projects that clearly do *not* fall within the negotiated procedure and for which the restricted procedure has previously been used—for example, contracts for complex IT systems.

In conclusion, the new directives give some additional flexibility to Member States over award procedures. They also provide increased certainty in the important areas of frameworks and electronic procurement. However, in the three main areas in which the directives purport to offer increased procedural flexibility—namely, electronic procurement, frameworks, and competitive dialogue—this increased flexibility is to a large extent an illusion, and in some respects the rules actually increase the constraints on Member States. This fact, combined with the more stringent provisions on issues such as disclosure of selection and award criteria, and the obligation to exclude those convicted of various offenses, discussed in section II.B above, casts doubt on the conclusion that the new legislative reforms have enhanced flexibility overall. In the author’s view, the reforms on balance move the EC’s regime yet further toward a common set of rules.

IV. TOWARD A COMMON APPROACH: COVERAGE OF EC PROCEDURAL RULES

A. Introduction

We have so far considered the convergence of procedural rules in the EC Member States through more detailed regulation of procurements covered

129. See Braun, *Strict Compliance versus Commercial Reality*, *supra* note 121.

130. See *id.*; PUBLIC PRIVATE PARTNERSHIPS AND PFI, *supra* note 121. On the problems and gray areas of competitive dialogue in the context of privately financed infrastructure procurement, see ARROWSMITH, *supra* note 1, ch. 10; Brown, *supra* note 22; Treumer, *supra* note 22.

by the directives. In addition, however, convergence is developing in the public sector¹³¹ as a result of the expanded *coverage* of EC procedural rules. So far, this has resulted mainly from judicial activity, but this activity is now also prompting new legislative initiatives in the same direction.

It is convenient to examine separately four separate aspects of this development toward extended coverage. First, and most importantly, the ECJ has significantly extended the scope of the EC regime through a controversial ruling that the EC Treaty not only prohibits discrimination, but also imposes certain “positive” obligations, including an obligation to advertise contracts. In this way, the ECJ has extended EC regulation of contract award procedures even to procurements that are outside the directives. This topic is considered in section IV.B below. Second, the ECJ has ruled—contrary to the view previously followed by many Member States—that the procurement of hard defense equipment is in certain cases regulated by the EC Treaty. The implications of this are examined in section IV.C below. Third, partly in response to these rulings, the European Commission is now contemplating new secondary legislation to regulate some contracts that are currently outside the directives. These plans are outlined in section IV.D below. Finally, the ECJ also has adopted an expansive interpretation of the coverage provisions of the directives, thus subjecting to detailed regulation certain contracts that were hitherto considered excluded. This point is considered in section IV.E below.

B. *Judicial Development: Positive Obligations Under the EC Treaty*

The most significant judicial development in the direction of expanded coverage is the judgment of the ECJ in *Telaustria*.¹³² In this case, the ECJ ruled that the Treaty imposes “positive” obligations of transparency on entities that are subject to the Treaty. As explained above, the EC Treaty contains certain “negative” obligations that, *inter alia*, require Member States to refrain from measures that discriminate on grounds of nationality against the industry of other Member States, and it has long been established that these apply to public procurement. However, in *Telaustria*, the Court went further than previous jurisprudence and common understanding of the Treaty, and held that these “negative” obligations imply also certain “positive” obligations to act in a transparent way, to make it possible to enforce the negative obligation not to discriminate. This case concerned a services concession—that is, broadly, a contract in which the service provider receives remuneration not directly from the public authority but by exploiting the service provided.¹³³ The case itself concerned a contract for compiling an electronic telephone directory, which was to be remunerated through the concessionaire’s right to exploit the information in the directory. The ECJ ruled that services concessions were

131. In the sense of public sector contracts that are governed by the Public Sector Directive, *supra* note 12. In the utilities sectors, the trend is toward reducing regulation, to take account of greater liberalization of utilities markets, as already discussed above.

132. Case C-324/98, *Telaustria Verlags GmbH v. Telekom Austria AG*, 2000 E.C.R. I-10745.

133. On the definition of services concession, *see*, more precisely, ARROWSMITH, *supra* note 1, ¶¶ 6.62 *et seq.*

outside the directives but that the award was nevertheless subject to an obligation of transparency.¹³⁴ This principle that the EC Treaty itself imposes positive obligations of transparency is important not just for services concessions, but also for other types of contracts outside the directives, notably those below the directives' thresholds, and for certain services contracts ("Part B" services contracts) to which the directives' obligations of advertising and competition do not apply.

It is not clear what precise obligations are comprised in this general transparency principle. In *Telaustria*, the Court stated that it "consists in ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the services market to be opened up to competition and the impartiality of the procurement process to be reviewed."¹³⁵ In the later *Coname* case, the ECJ commented that a transparency obligation does not necessarily involve "an obligation to hold an invitation to tender,"¹³⁶ but did not comment on whether this might sometimes be required and whether, even if no formal tender is necessary, some form of competition is nevertheless necessary. The European Commission has formally endorsed a broad interpretation in this respect: in the Commission's view, the transparency obligation includes both a requirement for a competition *and* the application of a principle of equal treatment when conducting the competition, which is not limited to nondiscrimination on grounds of nationality but is similar to that developed by the ECJ for the procurement directives.¹³⁷ Further, Advocate General Stix-Hackl stated in *Coname* that transparency obligations apply not just to advertising, but also to the choice of procedure and to selection criteria.¹³⁸

It is clear that the *Telaustria* ruling imposes important obligations for all public contracts in the EC, and creates the potential for significant judicial control over the precise detail of all procedures. By its interpretation of the Treaty, the ECJ has brought within the scope of the EC's control over award procedures a significant number of contracts hitherto considered to be ex-

134. *Telaustria*, 2000 E.C.R. at I-10745, ¶¶ 60–61. Since this was a services contract, this obligation arose under Article 49 E.C. In the case of a contract involving the supply or use of goods, such a transparency obligation will arise under Article 28 E.C.

135. *Telaustria*, 2000 E.C.R. at I-10745, ¶ 62. However, the Court did not elaborate on the kind of publicity that is necessary (for example, when, if it all, it is sufficient to publicize work by publicity for a list of approved suppliers, or when, if at all, publicity must be Europe-wide). On this issue including the formal views of the European Commission, see, further, ARROWSMITH, *supra* note 1, ¶ 4.12.

136. Case C-231/03, *Consorzio Aziende Metano v. Comune di Cingia de' Botti (Coname)*, 2005 E.C.R. ¶ 21, available at <http://www.curia.eu.int>.

137. See *Commission Green Paper on Public-Private Partnerships and Community Law on Public Contracts and Concessions*, ¶ 30, COM (2004) 327 final (Apr. 30, 2004). The view that the equal treatment under the Treaty goes beyond prohibiting discrimination is controversial. See Matthias Krüger, *The Principles of Equal Treatment and Transparency and the Commission Interpretative Communication on Concessions*, 12 PUB. PROCUREMENT L. REV. 181, 182 (2003) (whose view is shared by the present author, see ARROWSMITH, *supra* note 1, ¶ 4.16). However, some judicial support for the Commission's view can now possibly be found in Case C-458/03, *Parking Brixen v. Gemeinde Brixen*, 2005 E.C.R. ¶ 48 (Oct. 13, 2005), available at <http://www.curia.eu.int>.

138. *Coname*, 2005 E.C.R. ¶ 21.

cluded from that control, because they were excluded from the directives. Of course, the ECJ is likely to consider the reasons for those exclusions in deciding how the transparency obligations should apply. For example, it has already stated that transparency may not be required in the case of contracts of “modest economic interest,”¹³⁹ nor when the exclusion of transparency is justified for other objective reasons.¹⁴⁰ However, as *Telaustria* itself makes clear, the ECJ will impose procedural rules for excluded contracts when its view differs from that taken in the directives on whether it is appropriate to apply such rules. In practice, such rules seem likely to be applied for many below-threshold contracts—perhaps at a level at which national law would normally require competition—and for Part B services contracts, as well as for concessions.

The ruling in *Telaustria* on this point has been the subject of criticism,¹⁴¹ not least because of the uncertainty it creates (entities have almost no guidance on what specific procedures they must follow) and because it undermines the carefully deliberated decisions made by the Community legislature when the directives were adopted. However, the ECJ has explicitly rejected recent attempts to overturn the *Telaustria* jurisprudence.¹⁴²

In the medium term, a likely important effect of the *Telaustria* decision will be to push Member States toward agreeing on new secondary legislation to regulate those areas excluded from the directives, both to remove the current uncertainty and to control the content of regulation (since the ECJ will probably be reluctant to use the Treaty to add to detailed obligations set out in secondary legislation). This issue is discussed further in section IV.D below.

C. *Judicial Development: Expanded Coverage of Defense Procurement*

Another judicial development that extended the scope of the EC Treaty occurred in Case C-414/97, *Commission v Spain*.¹⁴³ The case concerned Article 296(1)(b) of the Treaty, which states:

Any Member State may take such measures as it considers necessary for the essential interests of its security which are connected with the production of or trade in arms, munitions and war material; such measures shall not adversely affect the conditions of competition in the common market regarding products which are not intended for specifically military purposes.

139. *Id.* ¶ 20.

140. *Id.* ¶ 9. Advocate General Stix-Hackl in that case stated that exclusions from advertising under the directive (which applies, for example, when for certain reasons such as technical reasons there is only one possible supplier) also will justify exclusions from advertising under the Treaty. *Id.*

141. Including criticism by the present author. See ARROWSMITH, *supra* note 1, ¶ 4.15; Peter Braun, *A Matter of Principle(s): The Treatment of Contracts Falling Outside the Scope of the European Public Procurement Directives*, 9 PUB. PROCUREMENT L. REV. 39 (2000); Erik Pijnacker Hordijk & Maarten Meulenbelt, *A Bridge Too Far: Why the European Commission's Attempts to Construct an Obligation to Tender Outside the Scope of the Public Procurement Directives Should Be Dismissed*, 14 PUB. PROCUREMENT L. REV. 123 (2005).

142. This was confirmed in Case C-231/03, *Consorzio Aziende Metano v. Comune di Cingia de' Botti (Coname)*, 2005 E.C.R. ¶ 21, and *Parking Brixen*, 2005 E.C.R. ¶ 48.

143. Case C-414/97, *Commission v Spain*, 1999 E.C.R. I-5585.

This provision gives a complete exemption from the EC Treaty for certain measures, including procurement measures, taken in connection with hard defense equipment (for example, missiles and fighter aircraft¹⁴⁴). Thus, for example, a Member State can sometimes invoke this provision to buy military equipment from a national supplier for security reasons by a direct tender with no advertisement, without violating Article 28 EC. For many years, it was assumed that the provision excluded from the Treaty *all* measures relating to the procurement of hard defense materiel, with the result that Member States could limit their purchases to national suppliers not just for military reasons, but also for purely economic reasons, such as to maintain jobs. However, in the *Spain* case, the ECJ ruled that the exemption is not automatic, but applies only when a particular measure is excluded for security reasons. In this case, the ECJ concluded that the exemption did apply to a decision by Spain to exclude military equipment when implementing a directive imposing a tax on the import and sale of goods. This result was because “in the present case, the Kingdom of Spain has not demonstrated that the exemptions provided for by the Spanish Law are necessary for the protection of the essential interests of its security.”¹⁴⁵ Thus, the Court made it clear that the exemption applies only when invoked on security grounds.

The precise significance of the exemption will depend on the degree of discretion available to Member States in invoking it. While the *Spain* case itself indicates that it is not sufficient merely to *assert* the application of the exemption, as was done by Spain, Member States probably enjoy a wide margin of discretion in applying the exemption,¹⁴⁶ especially regarding sensitive material such as nuclear weapons or biological or chemical weapons. Nevertheless, the decision in the *Spain* case represents a significant extension of the EC’s procurement regime. The decision precludes the overt use of hard de-

144. Article 296(2) provides that the Council, acting unanimously, shall draw up a list of the products to which it applies; this was done in a Council Decision of April 15, 1958. The list is set out in Answer to Written Question 574/85, 1985 O.J. (C 287) 9. See Martin Trybus, *The List of Hard Defence Products Under Article 296 EC*, 12 PUB. PROCUREMENT L. REV. NA15 (2003); Katharina Eikenberg, *Article 296 (ex 223) E.C. and External Trade in Strategic Goods*, 25 EUR. L. REV. 117 (2000); ARROWSMITH, *supra* note 1, ¶ 4.62. In the case of products not on the list, other exemptions may cover some purchases, such as a specific exemption from Article 28 on grounds of public security, contained in Article 30 EC.

145. *Spain*, 1999 E.C.R. ¶ 22.

146. The issue was not considered further in *Spain*, since Spain did not provide any evidence to support its security claim and the preamble to the Spanish measure also stated that it was mainly concerned with setting the financial basis for the armed forces. Thus, on its face, the measure did not indicate a link with security. In Case T-26/01, *Fiocchi Munizioni SpA v. Commission*, 2003 E.C.R. II-3951, ¶ 58, the CFI stated that Article 296 confers “a particularly wide discretion in assessing the needs receiving protection.” States appear to enjoy a wide margin of discretion in relation to other security exemptions under the Treaty when invoked for military reasons (see Case C-252/01, *Commission v. Belgium*, 2003 E.C.R. I-11859) and Article 296 is likely to be interpreted even more leniently. See also ARROWSMITH, *supra* note 1, ¶ 4.61. The European Commission may publish an Interpretative Communication on the scope of the Article 296 exemption. See *Commission of the European Communities, Green Paper on Defence Procurement*, at 9, COM (2004) 608.

fense purchasing to boost the national economy. It also precludes reliance on the exemption in cases in which there is no plausible security justification for restricting purchases to national industry or a particular national supplier. *Inter alia*, this will affect collaborative purchases with other Member States, including through the new European Defence Agency (which was set up within the EU in 2004 to provide a framework for voluntary cooperation in defense procurement).¹⁴⁷ In the past, it has been common to share work on collaborative procurements in proportion to each state's financial contribution to the project, but this sharing is no longer possible: such an approach is patently based on politico-economic considerations, rather than security concerns.

The decision in the *Spain* case is important not merely for prohibiting discrimination in hard defense procurement, but also because of its implications for contract award procedures in this field.

First, the *Telaustria* judgment, ruling that positive obligations apply under the EC Treaty, means that those defense purchases that *are* within the EC Treaty are subject to positive regulation in accordance with the Treaty "transparency" obligation, discussed in section IV.B above.

In addition, the fact that measures relating to hard defense equipment are not totally excluded from the Treaty means that the EC has some power to regulate the procurement of hard defense equipment to create a single market under the EC Treaty (although this will not apply to the extent that Article 296 applies). This situation gives rise to the possibility of EC secondary legislation to regulate hard defense procurement.

This situation also raises the question of whether the current Public Sector Directive ever applies to the procurement of hard defense equipment. The old directives apparently did not. Article 3 of the Supply Directive excluded all "products" to which Article 296(1)(b) EC applied,¹⁴⁸ indicating that con-

147. Council Joint Action on the Establishment of the European Defense Agency No. 2004/551 of 12 July 2004, 2004 O.J. (L 245) 17 (EC). The agency's main objectives are to create defense capabilities for crisis management; to strengthen the European Defense Technological and Industrial Base; to enhance European armaments cooperation, including by promoting new cooperative projects, coordinating existing programs, managing specific programs, and promoting value for money by encouraging best practice; and creating a competitive European defense equipment market. The Agency will not initially undertake procurement itself. *See also* Aris Georgopoulos, *The New European Defence Agency: Major Development or Fig Leaf?* 14 PUB. PROCUREMENT L. REV. 103 (2005); DANIEL KEOHANE, CTR. FOR EUROPEAN REFORM POLICY BRIEF, EUROPE'S NEW DEFENCE AGENCY (2004), available at http://www.cer.org.uk/pdf/policybrief_defence_agency.pdf. *See* EUR. DEF. AGENCY, DECISION OF THE STEERING BOARD OF 16 DECEMBER 2005 TO AMEND THE FINANCIAL PROVISIONS (TITLE III ON PROCUREMENT) (2005), available at http://www.eda.eu.int/procurement/Publication%20FP%20in%20OJ_final%2016-12-05.pdf.

148. On the other hand, Article 4(1) of the Services Directive 92/50 provided simply that the directive did not apply to "contracts" to which Article 296 applied, which could be interpreted as excluding only contracts for services to which Article 296 actually applied. Probably, however, it referred to any contracts for services related to products covered by Article 296, since the provision was intended to provide a parallel for services for the provision set out above in relation to supplies.

tracts for all such products were excluded, regardless of whether there was a security justification for exclusion.¹⁴⁹ However, the wording of the new Public Sector Directive differs slightly, providing in Article 10 that “this Directive shall apply to public contracts awarded by contracting authorities in the field of defense, subject to Article 296 of the Treaty.” This new provision is open to the interpretation that procurements are not excluded simply because the covered products themselves are under Article 296 E.C., but only when the *particular procurement* is covered by Article 296, namely when a Member State invokes Article 296 on security grounds. In its recent Green Paper on defense procurement, the European Commission appears to favor this interpretation.¹⁵⁰ If this is indeed the effect of the new directive, it is a change of huge significance, subjecting some hard defense procurement to the detailed procedures of the directives. However, it is not clear that this interpretation is correct. Most notably, the new Directive indicates in the correlation table in Annex XII¹⁵¹ that Article 10 does not introduce any change to the previous position.¹⁵² Further, the fact that this issue, and especially the suitability of the directives’ procedures for defense equipment, was not debated during the legislative process supports the conclusion that no change was intended, and the ECJ thus may be reluctant to interpret the directive in a manner that entails such a monumental change. On the other hand, such an interpretation clearly cannot be ruled out.

The fact that, at the very least, positive obligations apply to some hard defense purchases under the Treaty makes it more likely that, in this area, EC Member States will eventually agree to specific secondary legislation. Further, the likelihood of such legislation is increased by the possibility that the stringent procedures of the general Public Sector Directive *might* be held applicable. Thus, the decision in *Commission v Spain*, like that in *Telaustria*, has an immediate effect in expanding the scope of EC regulation, and may act as a catalyst for future detailed regulation.

D. Future EC Legislation to Regulate Areas Excluded from the EC Directives

Through an expansive interpretation of the EC Treaty, the ECJ has expanded the scope of the EC’s regulation of contract award procedures into new areas. In the future, it is likely that some, if not all, of these areas also will be covered by EC secondary legislation. As noted above, this process

149. This wording was no doubt intended to reflect the prevailing view of the Treaty as excluding any measures connected with hard defense products.

150. *Green Paper on Defence Procurement*, *supra* note 146, at 6. This interpretation is proposed by Martin Trybus, *Defence Procurement: The New Public Sector Directive and Beyond*, 13 *PUB. PROCUREMENT L. REV.* 198 (2004).

151. This table explains which Articles of the new directive correspond to Articles of the former directives and whether amendments are intended.

152. The Explanatory Memorandum on Article 7 also states that no change in substance is intended—although it is true that the English wording has changed since that memorandum was issued.

seems likely to be accelerated by the ECJ's approach to the Treaty, both to enable Member States collectively to assert greater control over the content of procedures and to remove the current uncertainty. Now that the 2004 directives have been adopted, the Commission has already turned its attention to two "new" areas, namely concessions and hard defense procurement.

As to the first, in 2004 the Commission published a Green Paper on public-private partnerships and the procurement rules.¹⁵³ This paper launched an initial debate on public-private partnerships (PPPs), defined to include all arrangements under which the private sector is involved in providing public infrastructure. Such arrangements include both contracts involving direct payment from the government (the usual arrangement for contracts for building and operating prisons or schools, for example), which are currently governed by the full rules of the Public Sector Directive, and concession contracts, which are currently largely excluded from the directive, but were held in *Telaustria* to be subject to positive obligations under the Treaty.¹⁵⁴ The Green Paper sought the views of interested parties on whether the EC should adopt further secondary legislation to regulate such arrangements, possibly taking the form of a single set of rules for all such contracts, or special rules for concessions only, and which could either be based on the existing Public Sector Directive (or even incorporated into it) or take an entirely different form. In November 2005, following consultation, the Commission issued a follow-up Communication.¹⁵⁵ In this publication, the Commission has concluded that it is not appropriate to subject all contractual¹⁵⁶ PPPs to a single regime¹⁵⁷ (thus contemplating that those that do not take the form of concessions will remain under the current Public Sector Directive), but that new secondary legislation is the "preferable option" to deal with contractual concessions.¹⁵⁸ The Commission intends to undertake further research on concessions during 2006 before expressing a definitive view on the need for this legislation or on its possible contents,¹⁵⁹ but it seems likely that it will propose legislation in due course.

153. *Commission Green Paper on Public-Private Partnerships and Community Law on Public Contracts and Concessions*, COM (2004) 327 final (Apr. 4, 2004).

154. Services concessions are excluded altogether, as held in Case C-324/98, *Telaustria Verlags GmbH v. Telekom Austria AG*, 2000 E.C.R. I-10745, while works concessions are subject only to very limited obligations (see Title III of the Public Sector Directive, *supra* note 12).

155. *Commission Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Public-Private Partnerships and Community Law on Public Procurement and Concessions*, COM (2005) 569 final (Nov. 15, 2005).

156. The Green Paper also contemplated the possibility of secondary legislation on noncontractual forms of public-private partnership such as the creation of joint venture companies between the public and private sectors (referred to as "institutionalized PPPs") but has decided to proceed in the first instance simply by issuing an Interpretative Communication on how it considers the Treaty to apply to such PPPs. See *Commission Communication to the European Parliament*, *supra* note 155, at 9.

157. *Commission Communication to the European Parliament*, *supra* 155, at 5.

158. *Id.* at 8.

159. *Id.* at 9, 11.

Explicit rules also eventually may be adopted through the EU¹⁶⁰ to govern award procedures for contracts for hard defense equipment. However, the shape of future regulation is difficult to predict because of the complexity of the legal and political landscape. As explained above, the ECJ decision in *Commission v. Spain* established that measures governing hard defense equipment are within the EC Treaty except where excluded on security grounds—implying transparency obligations as well as legislative competence for the EC for contracts to which the Article 296 derogation does not apply. However, it does not follow that any further regulation *will* be undertaken under the EC Treaty, even for contracts falling outside the Article 296 derogation. This absence of further regulation is because, within the European Union, there is also a possibility for taking action outside the EC Treaty under the so-called Second Pillar of the EU, dealing with the EU's Common Foreign and Security Policy.¹⁶¹ This second option involves the possibility that any regulatory measures taken will not be legally binding, and may not involve all Member States.¹⁶² It also opens up greater possibilities for a coordinated approach covering both contracts that are subject to the Article 296 derogation (and so outside the scope of regulation under the EC Treaty) and those that are not subject to the derogation. (In this respect, it can be noted that the European Defence Agency has already agreed to a voluntary Code of Conduct for its members for awarding contracts that are subject to the derogation and thus excluded from possible regulation under the EC Treaty itself).¹⁶³ In September 2004, the European Commission published a Green Paper, and in December 2005, a follow-up Communication, that envisages regulation through

160. Another consideration is the possibility that future regulatory action might occur through a defense organization, notably the Western European Armaments Group, already responsible for the regulatory framework of the European Defense Equipment Market (EDEM). EDEM represents an existing, limited, attempt to liberalize defense markets among a number of European countries, although subject to a principle of *juste retour*, providing for work to be distributed according to financial contributions to procurement projects. For a summary, see ARROWSMITH, *supra* note 1, ¶ 6.101; MARTIN TRYBUS, EUROPEAN DEFENCE PROCUREMENT LAW 31–44 (1999); and, for updated information, see <http://www.weu.int/weag>. However, since many of the key functions of WEU are being transferred to the EU framework, it now seems very likely that the EU will play the major role.

161. It appears that measures to liberalize armaments could be taken under either the first or second pillar. Article 17 of the Treaty of the European Union (TEU) provides that the progressive framing of a common defense policy will be supported, as Member States consider appropriate, by cooperation between them in the field of armaments, placing this issue within the Second Pillar. See MARTIN TRYBUS, EUROPEAN UNION LAW AND DEFENCE INTEGRATION ch. 5 (2005), for information on the relationship between Article 296 EC and Article 17 TEU; Consolidated Version of the Treaty on European Union, art. 17, 2002 O.J. (C 325) 44, available at <http://europa.eu.int>.

162. See Aris Georgopoulos, *Defence Procurement and EU Law*, 30 EUR. L. REV. 559 (2005).

163. EUR.DEF. AGENCY, THE CODE OF CONDUCT ON DEFENCE PROCUREMENT OF THE EU MEMBER STATES PARTICIPATING IN THE EUROPEAN DEFENCE AGENCY (2005), available at <http://www.eda.eu.int/reference/eda/EDA%20-%20Code%20of%20Conduct%20-%20European%20Defence%20Equipment%20Market.htm> (last visited Mar. 2, 2006). The Code is not legally binding and even members of the agency may choose whether or not to apply it.

the First Pillar under the EC Treaty,¹⁶⁴ taking the same ambitious approach as with civil procurement—that is, applying to all Member States, and involving legally binding rules. However, it is by no means clear that the EU Member States will accept this approach over a Second Pillar approach. The most that can be said at present is that, given the developments under the Treaty and the Commission's explicit initiative with the Green Paper and Communication, the likelihood is that progress will be made in some forum toward further explicit rules to govern hard defense procurement in some or all Member States.

E. Judicial Interpretation of the Scope of the Procurement Directives

The ECJ's expansive interpretation of the Treaty and the initiatives toward new secondary legislation represent the major recent developments in expanding coverage of the EC procurement regime. However, it also should be mentioned that the ECJ has tended toward a broad interpretation when defining the scope of the Public Sector Directive. This tendency can be illustrated by reference, in particular, to two related areas: the directive's application to government entities that operate in the market and its application to contracts between two public sector bodies.

As to the first point, as well as applying to entities that are part of the State and to regional and local authorities, the directives apply to any "body governed by public law." These three groups of covered bodies are collectively referred to as "contracting authorities."¹⁶⁵ In principle, the concept of a body governed by public law covers any body with legal personality, which either is financed for the most part by another contracting authority or is subject to management supervision by such an authority or has an administrative, managerial, or supervisory board more than half of whose members are appointed by another contracting authority. In many Member States, this definition catches bodies such as housing associations or state universities, for example. Bodies falling within the definition are all considered to be at risk of being influenced by government to favor national industry in their purchasing. The definition excludes, however, any body "established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character."

It was probably originally envisaged that this latter limitation would provide a broad exclusion for public sector entities that offer goods or services in the marketplace. The scope of the limitation was probably intended to correspond with the concept of an "undertaking" under EC competition law, with entities that operate as undertakings being covered by competition law

164. *Green Paper on Defence Procurement*, *supra* note 146; *Commission Communication to the Council and the European Parliament on the Results of the Consultation Launched by the Green Paper on Defence Procurement and on the Future Commission Initiatives*, COM (2005) 626 final.

165. Defined in Article 1(9) of the Public Sector Directive, *supra* note 12, as covering the three groups above.

(the main rules of EC competition law apply only to undertakings),¹⁶⁶ but outside the scope of the Public Sector Directive. This view is supported by the fact that the Utilities Directive applies not just to contracting authorities but, in addition, to a separate category of “public undertakings.” However, the ECJ has interpreted “industrial or commercial character” in a narrow way, effectively excluding only those bodies that offer goods or services in a *competitive* market or otherwise operate under strictly commercial conditions,¹⁶⁷ and thus probably bringing within the Public Sector Directive many entities that are “undertakings” in competition law. Further, the ECJ has ruled that an entity that carries out any activity that is not of a commercial or industrial nature is covered by the Public Sector Directive in respect of *all* its activities, even those that *are* of a commercial or industrial nature.¹⁶⁸ This approach means that, if the government wishes to set up a commercial body or unit to operate in the market without being subject to the constraints of the directive in its purchasing, it must set up a legal entity that is separate from any public authority, and cannot entrust the entity with even minor functions of a non-commercial nature. The ECJ’s approach in this latter respect has been criticized¹⁶⁹ and it is inconsistent with the approach of the new directives of excluding utility activities carried on under commercial conditions, regardless of whether the entity carrying them out also engages in “non-commercial” activities.¹⁷⁰

A second important respect in which the Public Sector Directive has been interpreted broadly is in its application to arrangements between different parts of the public sector.¹⁷¹ National laws often do not treat all of these arrangements as contracts to be awarded in accordance with public procurement laws, but regard some as purely administrative arrangements that may be allocated without competition. This treatment is reflected, for example, in certain provisions of the World Trade Organization Agreement on Government Procurement: Canada, for example, excludes from the GPA “procurements . . . made by one entity or enterprise from another entity or enterprise

166. The definition is in Article 1(9) of the Public Sector Directive, *supra* note 12.

167. See Joined Cases C-223/99 & C-260/99, *Agora Srl v. Ente Autonomo Fiera Internazionale di Milano*, 2001 E.C.R. I-3605, 3621–24; Case C-373/00, *Adolf Truley v. Bestattung Wien*, 2003 E.C.R. I-1931; Case C-18/01, *Arkkitehtuuritoimisto Riitta Korhonen Oy v. Varkauden Taitotalo Oy*, 2003 E.C.R. I-5321; Case C-283/00, *Commission v. Spain*, 2003 E.C.R. I-11697; and the discussion in ARROWSMITH, *supra* note 1, ¶ 5.14.

168. Case C-44/96, *Mannesmann Anlagenbau Austria AG v. Strohal Rotationsdruck GesmbH*, 1998 E.C.R. I-73. This applies even if the commercial activities predominate. *Id.* at I-75; Case C-360/96, *Gemeente Arnhem v. BFI Holding BV*, 1998 E.C.R. I-6821.

169. Evangelia Papangeli, *The Application of the E.U.’s Works, Supplies and Services Directives to Commercial Entities*, 9 PUB. PROCUREMENT L. REV. 201 (2000); ARROWSMITH, *supra* note 1, ¶ 5.18.

170. The exclusion from the Public Sector Directive, *supra* note 12, for contracts connected with telecommunications activities, contained in Article 13, applies to entities that undertake other (noncommercial) activities, as does the exemption under Article 30 of the Utilities Directives, *supra* note 15, for utility activities carried out in competitive markets.

171. See Kurt Weltzein, *Avoiding the Procurement Rules by Awarding Contracts to an In-house Entity: Scope of the Procurement Directives in the Classical Sector*, 5 PUB. PROCUREMENT L. REV. 237 (2005).

of Canada.”¹⁷² Formerly, EC Member States had divergent approaches to this issue, but the ECJ has interpreted the directives strictly to require as a general rule that arrangements with other public bodies should be awarded by competition under the directives.¹⁷³ There are explicit and limited exceptions in the directives for services entrusted to another contracting authority where that authority has special or exclusive rights connected with the service provision¹⁷⁴ (such as a legal monopoly over providing that service to the public sector) and for goods or services bought from a contracting authority that has itself followed the directives in acquiring the goods and services.¹⁷⁵ The ECJ also has recognized an implied exception to the requirement to follow the directive for purchases from an entity over which the procuring entity exercises the same control as over its own departments,¹⁷⁶ such as certain 100-percent-owned subsidiaries (which are regarded as “in-house” transactions in substance). However, this exception has been narrowly interpreted, and can never apply when there is any private investment in the entity awarded the contract.¹⁷⁷ The result of the ECJ’s strict interpretation is to impose a uniform approach to this subject across the EC, which involves the tendering of many arrangements formerly regarded by national governments as a matter of internal administrative organization.

V. TOWARD A COMMON APPROACH: REMEDIES FOR SUPPLIERS

A final area in which EC law appears to be moving toward a more standardized approach is that of remedies. As noted in section II above, remedies are governed by the Remedies Directive and the Utilities Remedies Directive, which require an effective and rapid system of supplier remedies before an independent national review body, including provision for interim measures, setting aside of unlawful decisions, and damages. The requirements of these directives are similar to the provisions on challenge procedures set out in Article XX of the WTO’s Government Procurement Agreement.¹⁷⁸ They

172. App. I Canada, Agreement on Government Procurement, Note 2 (Jan. 1, 1981), available at <http://www.wto.org>.

173. The same principles also govern the scope of the EC Treaty in its application to arrangements between government bodies. See Case C-231/03, *Consorzio Aziende Metano v. Comune di Cingia de’ Botti (Coname)*, 2005 E.C.R. ¶ 28.

174. Public Sector Directive, *supra* note 12, at art. 18; Utilities Directive, *supra* note 15, at art. 25. Article 23 of the Utilities Directive also provides an exemption for certain contracts awarded to affiliated undertakings (companies in the same group) and joint venture partners.

175. Public Sector Directive, *supra* note 12, at art. 11; Utilities Directive, *supra* note 15, at art. 29.

176. Case C-107/98, *Teckal Srl v. Comune di Viano*, 1999 E.C.R. I-8121. For the exemption to apply, the entity awarded the contract also must carry out the “essential part” of its activities for the procuring entity.

177. Case C-26/03, *Stadt Halle v. Arbeitsgemeinschaft Thermische Restabfall-und Energieverwertungsanlage TREA Leuna*, 2005 E.C.R. (Jan. 11, 2005), available at <http://www.curia.eu.int>; Case C-458/03, *Parking Brixen v. Gemeinde Brixen*, 2005 E.C.R. ¶ 48. In *Parking Brixen*, the ECJ also adopted a narrow interpretation of the *Teckal* exclusion in other respects.

178. See ARROWSMITH, *supra* note 1, ch. 14.

apply whenever there is a breach of EC law in an award procedure governed by the Public Sector or Utilities Directives, whether this is a violation of those directives or of the EC Treaty.¹⁷⁹ The EC Treaty, in any case, requires Member States to provide effective remedies for suppliers for *any* violation of EC procurement law, including for contracts outside the directives—for example, a violation of the Treaty's transparency obligations in the case of a services concession or below-threshold contract. However, the requirements of the Remedies Directives probably go further than those of the Treaty in some respects.¹⁸⁰ The Remedies Directives also have had the important effect of focusing the attention of Member States and the Commission on the provision of remedies, and of publicizing the existence of remedies to aggrieved suppliers.

The Remedies Directives, even more so than the “procedural” directives, appear to set out a broad framework of rules, with scope for Member States to implement a system that best suits their own requirements or traditions. The diversity of approaches in practice is obvious, particularly in relation to the forum for review: some states entrust initial review to a specialist procurement body, others to bodies specializing in administrative or competition law, and others to the ordinary courts.¹⁸¹ Some also split review functions between different authorities (in particular, several entrust “direct” review to specialist bodies while leaving damages to the ordinary courts),¹⁸² while others provide a single forum for all remedies. The explicit provisions of the Remedies Directives comprise almost as many provisions that emphasize the *discretion* of Member States¹⁸³ as they do provisions that limit discretion—not surprising, given the sensitivity of this subject at the time the Remedies Directives were adopted. Thus, for example, the directives state expressly that the review procedures are to be available “*under detailed rules which the Member States may establish*” at least to persons having or who have had an interest in obtaining a contract and who are or risk being harmed,¹⁸⁴ emphasizing the discretion of states in establishing the rules on standing. The directives also provide expressly that review procedures need not have automatic suspensive effect,¹⁸⁵ and that Member States may deny interim measures when the negative consequences *could* exceed the benefits.¹⁸⁶ The directives also state ex-

179. Or of any other rules of EC law applying to the procedure.

180. See ARROWSMITH, *supra* note 1, ¶ 21.74.

181. See sources cited *supra* note 18.

182. This is expressly permitted by Article 2(2) of the Remedies Directive, *supra* note 17, and Article 2(2) of the Utilities Remedies Directive, *supra* note 17.

183. See, e.g., sources cited *supra* note 18, and art. 2(5) of the Remedies Directive, *supra* note 17, and art. 2(6) of the Utilities Remedies Directive, *supra* note 17, providing that Member States may require a set aside as a precondition of a damages award.

184. Remedies Directive, *supra* note 17, at art. 1(3); Utilities Remedies Directive, *supra* note 17, at art. 1(3).

185. Remedies Directive, *supra* note 17, at art. 2(3); Utilities Remedies Directive, *supra* note 17, at art. 2(3).

186. Remedies Directive, *supra* note 17, at art. 2(4); Utilities Remedies Directive, *supra* note 17, at art. 2(4).

pressly that national law may determine the consequences of a concluded contract. Thus, in principle, national governments may decide whether to interfere with any contract made in violation of the EC rules or whether instead to leave a disappointed supplier solely to a damages remedy.¹⁸⁷

However, the discretion apparently conferred by the Remedies Directives is always subject to the general principles of rapidity and effectiveness. These provide potentially powerful tools for restricting the scope of national discretion, even in respect of matters on which a degree of choice, in principle, is acknowledged by the directives. In the early years of the directives, both the Member States and the Commission focused mainly on the directives' more specific requirements¹⁸⁸—such as the need to provide the named remedies—rather than on the overriding principles. This focus was not surprising given the sensitivity of the subject matter, and the reluctance of some Member States to adjust their traditional systems even to these requirements (for example, by applying the stipulated remedies to bodies not within the traditional scope of administrative law).¹⁸⁹ However, there have recently been signs of a move toward a more uniform approach, based on the effectiveness principle. Interestingly, the initial impetus has been provided mainly by cases referred to the ECJ by national courts seeking rulings on how to interpret the Remedies Directives, rather than by cases brought by the Commission. In addition, there seems likely to be a further move in the direction of common rules as a result of a review of the Remedies Directives launched by the Commission in October 2003.¹⁹⁰

One (relatively uncontroversial) example of the judicial development of the effectiveness principle is in the area of time limits. The Remedies Directives do not expressly mention the time that must be given to tenderers to launch proceedings, but the ECJ has indicated in *Universale-Bau*¹⁹¹ and *Santex*¹⁹² that the time for challenge must be reasonable¹⁹³ and must run from when the

187. Remedies Directive, *supra* note 17, at art. 2(6); Utilities Remedies Directive, *supra* note 17, at art. 2(6).

188. For cases of this kind pursued by the Commission to judgment in the ECJ: *see* Case C-275/03, *Commission v. Portugal*, 2004 O.J. (C 300) 21; Case C-214/00, *Commission v. Spain*, 2003 E.C.R. I-4667; Case C-236/95, *Commission v. Greece*, 1996 E.C.R. I-4459; Case C-225/97, *Commission v. France*, 1999 E.C.R. I-3011.

189. *See, e.g., Spain*, 2003 E.C.R. at I-4698.

190. Press Release, Commission, Public Procurement: Consultations on How Rejected Bidders Can Challenge Decisions IP/03/1455 (Oct. 27, 2003). Results of the consultations are available at <http://simap.eu.int>. *See also Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee of the Regions, Internal Market Strategy Priorities 2003–2006*, at 17–19, COM (2003) 238 final (July 5, 2003), where enforcement is the main issue considered in relation to public procurement.

191. Case C-470/99, *Universale-Bau AG v. Entsorgungsbetriebe Simmering GmbH*, 2002 E.C.R. I-11617.

192. Case C-327/00, *Santex SpA v. Unita Socio Sanitaria Locale n.42 di Pavia*, 2003 E.C.R. I-1877.

193. However, the ECJ has, in *Universale-Bau*, 2002 E.C.R. at I-1167, accepted very short periods as reasonable, including two weeks for challenging a refusal of an application to tender, provisions in a notification of an invitation to participate, and an award based on competition.

decision becomes known and not (as provided in the United Kingdom, for example¹⁹⁴) from the time at which the decision is made.

The most notable event so far as remedies is concerned, however, is what may be termed the *Alcatel* saga, originating in the ruling of the ECJ in Case C-81/98, *Alcatel Austria*.¹⁹⁵ This ruling and the subsequent response to it by the European Commission have resulted in significant legal reforms, along similar lines, in many Member States.

In this case, which concerned the system of remedies in Austria, the ECJ ruled that a system that does not allow a supplier to overturn a concluded contract (that is, an agreement that is legally binding) *and* also does not guarantee the possibility of challenging the award decision (that is, the decision on who the contractor is to be) before the contract is concluded (that is, becomes legally binding) does not meet the obligation in the Remedies Directives to provide an effective set-aside remedy against award decisions. At that time, several Member States—for example, the United Kingdom,¹⁹⁶ as well as Austria—did not comply with this obligation to provide an effective set aside. Most have responded by proposing or introducing a legal obligation for procuring entities to notify suppliers of the result of the award procedure before a contract is concluded, *and* to provide for a period of several days' delay (the "mandatory standstill period") before concluding that contract, to allow a supplier to challenge the award. Initially, the UK had decided to implement the *Alcatel* decision in a different way: instead of introducing a mandatory standstill, it was proposed to remove the current bar to challenging concluded contracts for a limited time after conclusion, so that suppliers would not be precluded from challenging the award decision simply because a contract had been signed. This approach was greatly preferred by consultees. It was considered disproportionate to require a delay before every contract simply because of the remote possibility of challenge, suppliers in the UK being reluctant to engage in litigation over procurement awards. However, the European Commission considered—erroneously in the author's view—that this approach was an inadequate means of implementing the *Alcatel* ruling and proposed to take the matter before the ECJ. Partly as a result of this situation, the government finally decided to introduce a mandatory standstill of ten days.¹⁹⁷

The *Alcatel* ruling is a significant development that will, particularly in the way that it has been interpreted by the European Commission as requiring a mandatory standstill period, result in much greater uniformity in Member States in the rules and remedies applied to award decisions. Further, while

194. See ARROWSMITH, *supra* note 1, ¶ 21.37.

195. Case C-81/98, *Alcatel Austria AG v. Bundesministerium für Wissenschaft und Verkehr*, 1999 E.C.R. I-7671.

196. See ARROWSMITH, *supra* note 1, ¶ 21.70.

197. See OFFICE OF GOV'T COMMERCE, CONSULTATION DOCUMENT, DRAFT AMENDMENTS TO THE UK PROCUREMENT REGULATIONS IMPLEMENTING THE EC *Alcatel* Judgment 3 (2005), available at <http://www.ogc.gov.uk>.

the focus of discussion in Europe has been mainly on the award decision that follows a competitive procurement procedure, as was in issue in *Alcatel* itself, the ruling also has significant implications for other decisions. For example, the principle that there must be an effective remedy to challenge any decision may require provision for ensuring an effective challenge to a decision to dispense with competition (for example, by requiring a public notice of any decision to use direct negotiation).

It also appears that any proposals that emerge from the current review of the Remedies Directive also will seek a degree of standardization of certain aspects of remedies, in order to give more precise and concrete effect to the effectiveness principle. Possibilities being discussed¹⁹⁸ include an express requirement for a mandatory standstill before concluding a contract (thus stating expressly what the Commission believes already to be the position following *Alcatel*); an explicit minimum time limit for challenging decisions, running from the date of knowledge of the decision; a requirement for rapid assessment of the need for interim measures combined with automatic suspension when there are reasonable grounds to believe there is a violation and that damage will occur without interim measures; and a mechanism whereby national enforcement authorities can contact procuring entities committing serious violations to warn those entities of the need to correct the procedure, with failure to do so resulting in more significant sanctions being applied if the complaint is later found justified.

VI. TOWARD A COMMON APPROACH: APPLICATION OF EC RULES AT THE NATIONAL LEVEL AND EXCHANGE OF INFORMATION ON BEST PRACTICES

So far this article has examined developments in the procurement rules at the EC level. However, the movement toward a common approach has occurred not only as a direct result of EC developments, but also indirectly.

First, in some Member States, the EC procurement directives have influenced the content of national procurement rules applying to contracts outside the directives. A key reason for this effect is the desire for simplicity in the procurement system: if there is no strong reason for choosing one set of rules—the previous national rules on a particular matter—above another—the EC rules—the system can be simplified by applying the EC rules in all relevant cases. The EC rules sometimes may be perceived as an improvement on existing national rules, and applied more widely in the national system for that reason. The value of equal treatment—treating like cases alike—also may lead to this approach.

This influence of EC law can now be seen extensively in the substantive rules governing procurement procedures, regarding both coverage and pro-

¹⁹⁸ These comments are based on information obtained from the European Commission and the English government's Office of Government Commerce.

cedures. Regarding coverage, for example, in 1993 Belgium introduced a comprehensive new Act on public procurement, which used the definition of entities covered under the EC procurement directives to define the entity coverage of domestic procurement rules.¹⁹⁹ As for award procedures, a number of states provide for use of the EC's main procedures for certain contracts below the EC directives' thresholds as well as those above it. This situation is likely to become more common following the ECJ ruling in *Telaustria* that positive obligations apply under the Treaty, as the most secure means of ensuring compliance with the Treaty. The same effect also can be seen in the field of remedies. Thus, some Member States have applied the system of remedies set up to implement the Remedies Directives, which technically applies only to violations of EC law in award procedures that are subject to the Public Sector or Utilities Directive, to other violations of procurement law, including violations occurring in award procedures outside the directives (such as below-threshold contracts) and violations of purely national rules. In Italy, for example, the legislature has now set up a single system of remedies for all violations.²⁰⁰

In addition, the contact between Member States resulting from EC membership has enhanced the exchange of ideas and experiences in the area of public procurement, and it is plausible that this, also, will accelerate the trend toward a common approach. In January 2003, a formal Public Procurement Network was established²⁰¹ involving the participation of the twenty-five EC Member States, three countries that are seeking to join the EC (Turkey, Bulgaria, and Romania), and four other European countries who are party to free trade agreements with the EC (Norway, Iceland, Liechtenstein, and Switzerland). The members of the PPN are mainly national officials responsible for government procurement policy, and one of the main functions of the network is to provide a forum for exchanging information on "best practice" in procurement—that is, on how to operate effective procurement, including within the EC rules.²⁰²

199. Belgium Act of Dec. 24 1993, which at the time of writing was still in force, implemented by a number of decrees. See David D'Hooghe, *The Belgian Act of December 24, 1993, on the Award of Public Contracts and on the Award of Some Private Works, Supplies and Services Contracts*, 3 PUB. PROCUREMENT L. REV. CS108 (1994), for more on this Act. See also Klaus Heineman & Robin Cunin, *Belgium*, in PUBLIC PROCUREMENT IN 30 JURISDICTIONS WORLDWIDE 25, 25 (2005) (stating that a new legislative framework is now being drafted in Belgium to implement the new directives).

200. See Andrea Crismani, *Legal Remedies in Public Procurement in Italy* 17–18 (Paper Presented at the International Conference: Protection of Rights in Public Procurement Procedures, Nov. 22, 2005).

201. Information on the PPN is available at <http://simap.eu.int>.

202. The other main function of the PPN is to provide an informal forum for the resolution of procurement disputes involving foreign suppliers. Suppliers can take their problems to their home country PPN representative, who will seek an informal resolution with the state that is the subject of the complaint.

VII. CONCLUSION

Like the WTO's Government Procurement Agreement (GPA), the procurement regime of the EC was created to open up markets to competition. Like the GPA, it was originally conceived as a broad framework, regulating only limited aspects of the procurement process. Within that framework, it was considered that Member States would remain free to maintain and adopt further detailed rules to implement their own national procurement policies, in accordance with their own requirements and traditions. This article has sought to demonstrate that the EC regime has now already moved substantially away from the original framework model, and is likely in the future to evolve even further in the direction of a common set of rules for the EC Member States.

The trend has been seen, first, in the development of the rules on award procedures for contracts under the directives, which cover most larger public sector procurements. As explained in section III, the area of national discretion over the detail of contract award procedures has been greatly diminished. This situation has resulted, in particular, from judicial interpretations by the ECJ: the Court has used the device of implied "principles," notably equal treatment and transparency, to fill in gaps in the explicit rules and to assert the right to regulate all procurement decisions, including on matters that are not mentioned in the directives and were previously considered to be left to the choice of Member States. As was also shown in section III, the area of discretion under the directives has been further diminished by the adoption of detailed rules on new issues in the 2004 directives.

Secondly, as explained in section IV, EC regulation of the details of contract award procedures has recently been extended into important areas previously thought to be outside detailed EC control. These include concessions, contracts below the directives' thresholds, and contracts for hard defense equipment. Again, the ECJ has played a significant role in the evolution of the law in this respect, and now appears to be acting as a catalyst for legislative activity in the same direction: while it would be difficult for the Member States to reverse the trend in the law by amending the Treaty, secondary legislation at least offers the prospect of controlling the content of the rules and avoiding uncertainty.

Thirdly, as was explained in section V, recent developments also appear to be reducing the area of discretion left to Member States in the matter of supplier remedies. Again, this reduction is seen both in judicial decisions, as exemplified by the *Alcatel* decision, and in plans for legislation—plans that, again, seem likely to be influenced by the direction already taken by the ECJ.

Finally, it was noted in section VI that the trend toward harmonized rules also is assisted by the fact that, for a variety of reasons, Member States have sometimes chosen to use EC law rules and concepts in areas that legally still remain within the area of national discretion. The same result perhaps can be

expected as a result of the cooperation and information exchange that is promoted by EC membership, and has to an extent been formalized (although not through the EC itself) in the Public Procurement Network.

The extent to which the Member States apply common rules, however, should not be exaggerated. First, the crystallization of the general principles established by the ECJ into precise rules that are applied by national procuring entities is still in its very early stages, both under the directives and under the Treaty. While the ECJ's rulings indicate that there exist common requirements on many matters not referred to in the directives, and some procedural obligations for contracts outside the directives, for most areas of decision making, it is not yet clear precisely what these requirements are. The same can be said of the general obligation to provide an effective remedies system under the Remedies Directives. As already mentioned, until there is greater clarity in the law, as a result of either judicial development or new secondary legislation, Member States, to a great extent, will continue in practice to apply existing, and often diverse, national rules. Further, only when this clarity is achieved will the precise reach of the "common" elements of EC procurement law become clear. Even to the extent that legal requirements are clear—for example, the basic requirement to advertise some hard defense contracts, and contracts of concession—it seems probable, based on anecdotal evidence, the experiences of the Commission,²⁰³ and past experience with the directives, that only gradually will these requirements permeate the consciousness and the practices of Member States and their procuring entities. As the Commission has recognized in its Communication on Public-Private Partnerships, in indicating its initial preference for legislation to govern the award of contractual PPPs, it may be necessary to adopt specific secondary legislation on these matters before compliance is achieved. It also needs emphasizing that areas of discretion remain to Member States and will continue to do so: in particular, Member States retain control over which award procedures and techniques to allow to their procuring entities (including whether and when to allow use of electronic auctions and framework agreements) and may probably generally enact stricter rules than those of the directives. However, there is no doubt that the trend toward more harmonized rules is a well-established and significant one, and is unlikely to reverse, but rather to accelerate.

A detailed analysis of the implications of this trend and the concerns that it raises is outside the scope of this article, but some brief general comments seem apposite. A first point to highlight is the extent to which the rules have been created by judicial development. One consequence of this, already mentioned, is the considerable uncertainty over the content of the legal obligations. This uncertainty is unsatisfactory for both procuring entities and suppliers, for the former particularly because of the stringent remedies regime,

203. For example, the Commission notes in its Communication on Public-Private Partnerships referred to in note 155, *supra*, that some of those who responded to the Green Paper on the subject were not aware of the existing transparency obligations for concessions under the EC Treaty.

which (at least for violation of the directives) include damages liability for lost profits, even in the absence of fault. In the case of contracts currently outside the directives, or subject to only limited regulatory obligations as well as legislative competence for the EC, this uncertainty seems likely to be mitigated to an extent by new secondary legislation setting out key obligations. However, uncertainty seems likely to remain for the immediate future in relation to issues that are not addressed expressly by secondary legislation, both under the existing directives and under new secondary instruments; the latter are unlikely to contain more detail than the existing Community legislation. The fact of judicial development of the law by the nonspecialist judges of the ECJ also raises the question of whether the content of the rules created to open up markets will take sufficient account of the needs of the procurement process. Both a lack of understanding of the practicalities of procurement and the bias toward market integration above other policies that the Court often exhibits—and exhibits in public procurement cases through its emphasis on transparency above discretion—may inhibit effective rulemaking.

A second issue that deserves brief comment is the desirability of the current trend toward common rules. In principle, a common system of procurement rules has advantages from a trade perspective, both for EC suppliers and for the EC's trading partners, including the United States (for which the EC public procurement market is of great interest²⁰⁴). The value of a common body of rules for different countries, to reduce the transaction costs of firms operating in international markets, was one of the main drivers for the successful project to create the UNCITRAL Model Law on Procurement of Goods, Construction and Services.²⁰⁵ The same consideration is also relevant in the context of the EC regime. However, EC legislators have not identified this consideration as a rationale for the EC regime. Further, it is also probably beyond EC competence to adopt common rules for this reason: in its main ruling on the legal power of the EC to regulate to create an internal market, the ECJ indicated that disparities in national rules that affect the internal market do not *per se* provide a legal justification for Community regulation.²⁰⁶

In addition, as the author has argued in more detail elsewhere, it is questionable whether a single body of procurement rules can ever be suitable for all Member States,²⁰⁷ given the different factual circumstances and different values that prevail. The differences have been magnified since the 2004 accession to the EC of ten new Member States,²⁰⁸ a number of which are former socialist states with a relatively limited experience of a market economy and of public procurement as a market activity. EC regulation of procurement

204. See Verdeaux, *supra* note 2, at 715–19, on the interest of EC markets in the United States.

205. See Sue Arrowsmith, *Public Procurement: An Appraisal of the UNCITRAL Model Law as a Global Standard*, 53 INT'L & COMP. L.Q. 17, 18–21 (2004), on the objectives of the Model Law.

206. Case C-376/98, *Germany v. Parliament and Council*, 2000 E.C.R. I-8419.

207. Sue Arrowsmith, *The EC Procurement Directives, National Procurement Policies and Better Governance: The Case for a New Approach*, 27 EUR. L.REV. 3 (2002) [hereinafter Arrowsmith, *EC Procurement Directives*].

208. See *supra* note 4.

according to common standards inevitably has a significant impact on the ability of Member States to promote their own national procurement policies in the manner that they consider most appropriate for their own circumstances. In particular, EC rules that focus on transparency have a significant impact on the choices of Member States, such as the United Kingdom, that do not rely heavily on transparency as a means to achieve national procurement objectives, but prefer to entrust procurement entities and/or individual procurement officers with a significant degree of discretion. These limitations on national discretion represent significant “costs” of the EC regime, costs that, from an EC constitutional perspective, need to be balanced against the benefits of more open procurement markets. Given the practical difficulties of achieving open markets and the limited progress so far made in this direction,²⁰⁹ these costs of the EC regime are arguably disproportionate to the benefits. Further, it is arguable that there are alternative means of pursuing Community objectives that could be equally, or only marginally less, effective, and that would not have such an adverse impact on national sovereignty in the area of procurement—for example, a system of benchmarking to establish the extent of market-openness in each Member State.²¹⁰ To the extent that this is the case, to pursue the integration of public markets through a strategy that focuses on detailed transparency rules may be inconsistent with the principles of European governance that were set out by the European Commission in a White Paper published in 2001.²¹¹ Further, the strict interpretation given to both the procedural and Remedies Directives is difficult to reconcile with the “spirit” of the directives, as reflected in the preambles and some of the explicit provisions, with their general and specific references to preserving national policies and practices.

In conclusion, the EC procurement regime appears to be in a process of transition from one in which Member States have the main responsibility for procurement procedures subject to a broad EC framework, to one in which procedures are laid down by the EC with a limited area of discretion for Member States. This trend toward a more harmonized body of rules certainly has advantages from a trade perspective, and it is this perspective that may have the most interest for a U.S. observer. However, from the perspective of both national government procurement policy and EC constitutional principle, both the existence of the trend toward harmonization and the manner in which it has occurred through judicial interpretation are not without problems. Thus, the developments in this direction are likely to be watched with interest by both insiders and outsiders, and are likely to be a lively subject of debate for some years to come.

209. See ARROWSMITH, *supra* note 1, ¶ 3.44 for a summary of the data.

210. See ARROWSMITH, *EC Procurement Directives*, *supra* note 207, at 21–23.

211. *Commission White Paper on European Governance*, at 10–11, COM (2001) 428 final (July 25, 2001). See ARROWSMITH, *EC Procurement Directives*, *supra* note 207, at 16, for a discussion from this perspective.